No. 88-1050

Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term, 1988
No. 88-1050

KAREN APPLEGATE and PHIL APPLEGATE, individually, and as parents of the late COLLEEN APPLEGATE, aka "SHAUNA GRANT",

Petitioners,

vs.

People of the State of California, and HAROLD FREEMAN,

Respondents,

vs.

JOHN VAN DE KAMP, Attorney General of the State of California, IRA REINER, District Attorney of Los Angeles County, JAMES K. HAHN, City Attorney of the City of Los Angeles,

Real Parties In Interest,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITIONERS' SUPPLEMENTAL BRIEF

* COUNSEL OF RECORD

JAMES J. CLANCY *
9055 La Tuna Canyon Road
Sun Valley, California 91352
(818) 352-2069
Attorney for Petitioners

SUBJECT INDEX PAGE

PETITIONERS' SUPPLEMENTAL BRIEF.....1-20

ARGUMENT.....1-20

I

THE CALIFORNIA SUPREME COURT'S ANALYSIS OF THE PANDERING PROVISION OF STATE PENAL CODE SECTION 266i DOES NOT CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION 1-20

(A) THE CALIFORNIA SUPREME COURT DID NOT CONSIDER OR DISTINGUISH THE IMPLICATIONS OF PEOPLE OF THE STATE OF CALIFORNIA V. JAMES MARVIN SOUTER, JR. (dba JAMES SOUTH OF WORLD MODELING AGENCY IN FREEMAN) ET AL. 178 CAL. RPTR. 111, HEARING DENIED BY THE CALIFORNIA SUPREME COURT ON JANUARY 27, 1982.....1-13

(B) THE "DELIMITING CONSTRUCTION" APPLIED BY THE CALIFORNIA SUPREME COURT IN RELATION TO THE PORNOGRAPHIC ACTS PERFORMED FOR FREEMAN IN HIS PRODUCTION OF THE HARD-CORE PORNOGRAPHIC FILM, "CAUGHT FROM BEHIND 2": THAT, "IN ORDER TO CONSTITUTE PROSTITUTION, THE MONEY OR OTHER CONSIDERATION MUST BE PAID FOR THE PURPOSE OF SEXUAL AROUSAL OR GRATIFICATION," VIOLATES NATURAL LAW PRINCIPLES AND DOES NOT CONSTITUTE AN ADEQUATE STATE GROUND OF DECISION 13-15

(C) THE CALIFORNIA SUPREME COURT'S ANALYSIS OF THE PANDERING PROVISION OF CALIFORNIA PENAL CODE SECTION 266i DOES NOT CONSTITUTE AN "INDEPENDENT" STATE GROUND OF DECISION 15-18

(D) THE NEED FOR THIS COURT TO REVIEW THE "LEWD CONDUCT-FREE SPEECH" FEDERAL ISSUE IS EMERGENT. SUCH A REVIEW COULD NOT, UNDER ANY SET OF CIRCUMSTANCES, BE VIEWED AS AN "ADVISORY OPINION " 19-20

CERTIFICATE OF SERVICE BY MAIL.....21

CASES

Dombrowski v. Pfister 380 U.S. 496 (1965).... 3

Fort Wayne Books Inc. v. Indiana,..... 19
No. 87-470

Frisby v. Schultz et al. 487 U.S.___,
101 L.Ed. 2d 420 (1988).....3,8

People v. Drolet 30 Cal. App.3d 207 (1973).. 17

People v. Fixler 56 Cal. App. 3d 321 (1976). 7
11,18

People v. Freeman 233 Cal. Rptr. 510 (1987)..18

People v. Freeman 250 Cal. Rptr. 598 (1988)..18

People v. Freeman 46 Cal. 3d 419.....2,3,12,18

People v. Tom Parker 33 Cal. App. 3d 842
(1973).....17

People v. James Marvin Souter 178 Cal. Rptr.
111 (1981).....1 thru 13
18,19

People v. Howard Zeihm 40 Cal. App.3d
1085 (1974).....17

People ex rel Hicks v. "Sarong Gals"
27 Cal. App. 3d 46 (1972).....17

People ex rel Hicks v. "Sarong Gals"
42 Cal. App. 3d 556, 117 Cal. Rptr.
24 (1974).....14,18

People ex rel Van De Kamp v. American
Art Enterprises, Inc. 75 Cal. App.
3d 523 (1977).....18

People ex rel Van De Kamp v. American
Art Enterprises, Inc. 177 Cal. Rptr.
776 (1981).....18

People ex rel Van De Kamp v. American
Art Enterprises, Inc. 33 Cal. 3d 328
(1983).....18

James Phalen v. Commonwealth of Virginia
12 L. Ed. 1030 (1850).....20

STATUTES, ORDINANCES, RULES

California Codes
California Civil Code, Section 5.....14
California Penal Code, Section 266i.. 1,2
11.15

California Rules of Court
Rule 976 (b).....8
Rule 976 (b)(1).....7,8
Rule 977 (a).....6

California Constitution, Article VI
Section 14.....10

TEXTS, MISCELLANEOUS

Blackstone, Commentaries on Common Law....13

P.B.S. Frontline Documentary Film
"Death of a Porn Queen".....19

California Civil Appellate Practice,
Second Edition (Cont. St. Bar, 1985)
at pages 521-532.....8,9,10

9 Witkin, California Procedure,
Third Edition, at pages 743-747.....17

In The
Supreme Court of the United States

October Term, 1988
No. 88-1050

KAREN APPLEGATE and PHIL APPLEGATE, individually, and as parents of the late COLLEEN APPLEGATE, aka "SHAUNA GRANT",

Petitioners,

vs.

People of the State of California, and HAROLD FREEMAN,

Respondents,

vs.

JOHN VAN DE KAMP, Attorney General of the State of California, IRA REINER, District Attorney of Los Angeles County, JAMES K. HAHN, City Attorney of the City of Los Angeles,

Real Parties In Interest,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITIONERS' SUPPLEMENTAL BRIEF

ARGUMENT

On February 1, 1989 Associate Justice O'Connor filed her opinion as the Circuit Judge for the 9th Circuit, which denied Los Angeles County District Attorney Ira Reiner's application for the issuance of a stay. A copy of Circuit Justice O'Connor's opinion is attached at Appendix A to this brief. Petitioners' Supplemental Brief is addressed to Justice O'Connor's conclusions in that opinion.

I

THE CALIFORNIA SUPREME COURT'S ANALYSIS OF THE PANDERING PROVISION OF STATE PENAL CODE SECTION 266i DOES NOT CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND OF DECISION.

(A) THE CALIFORNIA SUPREME COURT DID NOT CONSIDER OR DISTINGUISH THE IMPLICATIONS OF PEOPLE OF THE STATE OF CALIFORNIA V. JAMES MARVIN SOUTER, JR. (dba JAMES SOUTH OF WORLD MODELING AGENCY IN FREEMAN) ET AL. 178 CAL. RPTR. 111, HEARING DENIED BY THE CALIFORNIA SUPREME COURT ON JANUARY 27, 1982.

A copy of the Souter opinion is attached at Appendix B-1 through B-19 to this brief. In that case, the Appellate Courts in California addressed the identical facts, one of the identical actors (James South of World Modeling Agency), the identical issue, and the same type of argument which was before the 1988 California Supreme Court in People v. Harold Freeman 46 Cal.3d 419. See Appendix B-7 to this brief wherein the Souter Court stated the single issue to be:

> ISSUE PRESENTED
> THE ISSUE PRESENTED IN THIS APPEAL IS WHETHER PERSONS WHO PAY OTHERS TO PERFORM SEXUAL ACTIVITIES IN MOTION PICTURES CAN BE PROSECUTED FOR PANDERING UNDER SECTION 266i?

Unlike the Freeman Court in 1988, the Souter Court in 1982 (including the California Supreme Court, sub silentio) applied a "limiting construction" to California Penal Code section 266i and resolved the constitutional question

which, notwithstanding the full and complete answer which was given in Souter, was raised for a second time in Freeman.

Because the Souter case was before the California Appellate Courts in 1982 on a Motion to Dismiss an Information before trial, the Souter Court of Appeal was afforded, and did avail itself of the opportunity to construe Penal Code Section 266i in a way that resolved the hypothetical constitutional problem that "troubled" and "confused" the California Supreme Court Justices in Freeman, supra. The procedural advantage of Souter over Freeman is the same procedural advantage that Frisby et al. v. Schultz and Braun 487 U.S. ____, 101 L.Ed.2d 420 at 430 (June 27, 1988) enjoyed on appeal over Dombrowski v. Pfister 380 U.S. 496 (1965) at footnote 7. In Frisby, Justice O'Connor, writing for a majority of this Court, gave the City Ordinance a "limiting

construction" before it had been applied. The Souter Court did likewise. See that Court's opinion at Appendix B-12 to B-14 and B-15 to B-17 to this brief. Note in particular that Court's "limiting construction" reading:

> In the instant case, there is no such factual dispute as was present in Hill. The testimony at the preliminary hearing was unrebutted as to the type of activity in volved in these films--sexual intercourse and oral copulation. Consequently, we need not refer to that part of section 647, subdivision (b), which states that "prostitution includes any lewd act between persons for money or other consideration."
>
> Section 266i contains no definition of prostitution. Section 647, subdivision (b), states "[a]s used in this subdivision, 'prostitution' includes any lewd act between persons for money or other consideration." (Emphasis added.) The language of section 647, subdivision (b), is expressly limited to that subdivision by its own terms and should not be read into section 266i in the absence of a specific reference.
>
> In our view, the term "prostitution" as used in section 266i means performing acts of sexual intercourse for compensation. It is not our intent to set forth a definition of prostitution and to state

> all the possible variations of activity which could be encompassed within the term. We approve the definition set forth in Black's Law Dictionary (5th ed. 1979), which states at page 1100, "Prostitution is performing an act of sexual intercourse for hire, or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire." This is a clear and concise definition of the term prostitution which is not subject to question and which would include within its meaning both acts of sexual intercourse and oral copulatoin as is present in the instant case.
>
> Thus, section 266i is violated if a person procures another person to commit an act of sexual intercourse or oral copulation for compensation.

Unfortunately, the "limiting construction" rule of law adopted in People v. Souter, supra, could not be brought to the attention of the Justices on the 1988 California Supreme Court because the attorneys for the People of the State of California were barred from doing so due to: (1) the ambiguous "depublication" action taken by the 1982 California Supreme Court, and (2) Cali-

fornia Rule of Court 977(a). In denying the petition for a hearing in Souter, the California Supreme Court ordered that the Souter opinion not be officially published, as ordered by the Court of Appeal. See the footnote in the Souter opinion at Appendix B-1 to this brief. Rule 977(a), which provides that an opinion that is not ordered published should not be cited or relied upon by a court or a party in any other action or proceeding except as provided in certain exceptions set forth at subdivision (b), compounded the problem. Because of the depublication in 1982, the People were precluded from citing to the 1988 California Supreme Court the very precedent which, under the doctrine of stare decisis, should have decided the issue and settled the appeal. Rule 977(a), as applied to the law and facts in People v. Souter, presents a clear case of denial of due

process of law and constitutional infringement.

Why the Court of Appeal opinion was ordered depublished in 1982 in Souter, supra, is not known.

It should be observed that, under California Rule of Court 976(b)(1), a Court may not order an opinion published unless it establishes a new rule of law, etc. See "Rules for Publication of Appellate Opinions" at Appendix C-1 through C-6 to this brief. Under one interpretation of People v. Souter, supra, that opinion merely applied an existing rule of law. See, in that regard, the Souter court's reference to People v. Fixler 56 Cal.App.3d, 321, 128 Cal. Rptr. 363 (Mar. 17, 1976), hearing denied by the California Supreme Court on May 14, 1976 (which is set forth at Appendix B-17 and B-18 to this brief).

However, viewed more precisely as an example of an opinion which applies a "limiting construction" of the type engaged in by this Court in Frisby et al. v. Schultz and Braun, supra, it appears to meet the criteria of Rule 976(b)(1). It would appear that such may have been the analysis of the Court of Appeal in Souter, supra, and the grounds upon which it certified the opinion for publication in the first instance. In such a case, it should have been published.

The California Supreme Court's practice of issuing depublication orders, because the opinions do not meet the criteria of California Rules of Court 976(b), has come under attack from commentators since the early 1970's. See "California Civil Appellate Practice, Second Edition," (Continuing St. Bar 1985) at 521-532. A copy of the Continuing Education of the Bar's analysis

is set forth at Appendix D-1 through D-12 to this brief. Certainly, in this case, the depublication has worked a severe injustice to the People of the State of California. A "limiting construction" rule of law (which was on review to the California Supreme Court under the then mandatory rules of review) was deprived of its "stare decisis", precedent status by an ambiguous order of depublication. See, in this regard, the text "Section 20.10 G. Effect of Supreme Court Order" at Appendix D-8 through D-10 to this brief.

It would appear that, due to the above unusual trial facts, and the denial of a hearing on January 27, 1982, the opinion in People v. Souter 178 Cal. Rptr. 111 must be construed as a "determination" of the California Supreme Court, and not merely as another case

of a decision by a Court of Appeal as to which the California Supreme Court has denied a hearing, for the following reasons: California Constitution Art VI section 14 required that the California Supreme Court's decision on the "limiting construction" on the appeal in People v. Souter be in writing with the Court's reasons stated. See the text in "Section 20.2 A 'When Opinions Must Be in Writing,'" and "section 20.3B 'Statement of the Court's Reasons,'" which is attached at Appendix D-1 and D-2 to this brief. Simple logic would seem to require that, under that constitutional provision, the California Supreme Court, in its review of People v. Souter was required to set forth in writing why Souter was depublished, and whether such depublication was due to the fact that it was regarded as an application of an existing rule of law to a set of facts which were

the same as those stated in the published opinion in People v. Fixler, supra, or, alternatively, as a "limiting construction" of Penal Code section 266i, which had been incorrectly deprived of certification and publication. For either reason, People v. Souter would have been controlling as a determination by the California Supreme Court, and not simply as a determination by the Court of Appeal.

The ultimate status of People v. Souter, supra, under California law is not an issue for a determination at this time on this Petition for a Writ of Certiorari. What is material and relevant on this Petition is the fact that the People on the State issue were deprived of procedural due process of law by the California Rule of Court which unconstitutionally precluded their citing People v. Souter and that, because of the uncertainty caused by the Calif-

ornia Supreme Court's not having considered Souter, its analysis in People v. Freeman does not constitute an adequate state ground for the decision, as Circuit Judge O'Connor has reasoned, and this Court does have jurisdiction to consider the federal issue which was erroneously decided by the California Supreme Court.

Upon remand on the federal issue, the California Supreme Court will have to examine, upon reargument, the State's contention on the State issue that the Souter "limiting construction" in 1982 which, through no fault of the People, was not cited to the California Supreme Court, is controlling law in California; that James Souter of World Modeling Agency had knowledge of that construction; that his co-conspirator Harold Freeman also had knowledge of such construction; and that Harold Freeman was, therefore,

foreclosed from arguing the contrary in his appeal from the criminal conviction. See, in this regard, Judge Lui's ruling as to James Souter in People v. Souter, supra, at Appendix B-17 and B-18 to this brief.

(B) THE "DELIMITING CONSTRUCTION" APPLIED BY THE CALIFORNIA SUPREME COURT IN RELATION TO THE PORNOGRAPHIC ACTS PERFORMED FOR FREEMAN IN HIS PRODUCTION OF THE HARD-CORE PORNOGRAPHIC FILM, "CAUGHT FROM BEHIND 2": THAT, "IN ORDER TO CONSTITUTE PROSTITUTION, THE MONEY OR OTHER CONSIDERATION MUST BE PAID FOR THE PURPOSE OF SEXUAL AROUSAL OR GRATIFICATION," VIOLATES NATURAL LAW PRINCIPLES AND DOES NOT CONSTITUTE AN ADEQUATE STATE GROUND OF DECISION.

The governmental proscription against "prostitution" is well nigh universal and, in the light of our Judaeo-Christian heritage, is a necessary part of both the common law and the natural law upon which such common law principles are based.

In Book IV of his Commentaries, Blackstone noted that prostitution was

an indictable offense against religion and morality under the common law.

The Common Law proscription is memorialized in the Red Light Abatement Laws of the 50 states, and "traditional" Red Light Abatement opinions, such as Justice Kaufman's opinion 14 years ago in People ex rel Hicks v. "Sarong Gals" et al. 117 Cal.Rptr. 24.

The delimiting, "new" construction of "prostitution" applied in 1988 by Justice Kaufman to the pornographic acts performed for Freeman in the production of the hard-core pornographic film, "Caught From Behind 2": that, "in order to constitute prostitution, the money or other consideration must be paid for the purpose of sexual arousal or gratification," clearly offends the above-stated common law principles and California Civil Code section 5, which requires that California Statutes be construed

in the light of the Common Law and not as new enactments.

(C) THE CALIFORNIA SUPREME COURT'S ANALYSIS OF THE PANDERING PROVISION OF CALIFORNIA PENAL CODE SECTION 266i DOES NOT CONSTITUTE AN "INDEPENDENT" STATE GROUND OF DECISION.

Petitioners read the State Supreme Court's opinion differently and respectfully disagree with Circuit Justice O'Connor's assumption that Justice Kaufman's "new" construction of Penal Code 266i was routine, was not under duress, and was arrived at by the California Supreme Court, independent of its ruling on the federal issue. The choice of language in three paragraphs of the opinion, and the 16 years of hotly contested appellate case law, demonstrating an entirely different public policy, instruct otherwise.

First, the Court was strangely suspicious of the People's motives (see

Appendix A-7 to the Petition for Writ of Certiorari herein.

This suspicion may have been due to the fact that the film "Caught From Behind 2" very obviously is hard-core pornography ---the Court reasoning, "Why wasn't the film prosecuted as hard-core pornography under the obscenity statutes?" See Appendix B-8, paragraph 1, to this brief.

Secondly, the Court was more certain of its ruling on the federal issue, and less certain of the soundness of the "new" construction of the term "prostitution," which it was applying in the State case (See Appendix A-11 to the Petition for Writ of Certiorari at "B. First Amendment Considerations").

Thirdly, the language employed to delimit the meaning of the term "prostitution" was unnatural and distorted. See Point 1(B) above at page 13.

Fourth, the past 16 years of hotly contested appellate litigation, involving sexual conduct in public and related First Amendment claims, demonstrate a radical departure from a solid public policy which was 180° out of phase with the Court's new "delimiting" construction as to the term "prostitution." All of those contests were taken to the California Supreme Court for full mandatory review. Under one interpretation of appellate caselaw in California, a denial of hearing after a mandatory review by the California Supreme Court has a special meaning. See 9 Witkin, California Procedure, Third Edition, at pages 743-747, a copy of which text is attached as Appendix E-1 through E-3 to this brief.

See People ex rel Hicks v. "Sarong Gals" 27 Cal. App. 3d 46 (August 3, 1972, hearing denied Nov. 9, 1972); People v. Drolet 30 Cal. App. 3d 207 (Jan. 26, 1973); People v. Tom Parker 33 Cal. App. 3d 842 (Aug. 6,1973, hearing denied Oct. 3, 1973); People v. Howard Zeihm 40 Cal. App. 3d 1085 (Aug. 2, 1974, hearing denied Oct. 10, 1974); People

ex rel Hicks v. " Sarong Gals"42 Cal. App. 3d, 556 (Oct. 18, 1974, hearing denied Dec. 11, 1974); People v. Fixler 56 Cal. App. 3d 321 (Mar. 17, 1976, hearing denied May 14, 1976); People ex rel Van De Kamp v. American Art Enterprises, Inc. 75 Cal. App. 3d, 523 (Nov. 30, 1977, hearing denied Feb. 2, 1978); People ex rel Van De Kamp v. American Art Enterprises, Inc. 177 Cal. Rptr. 776 (Oct. 27, 1981, hearing granted Jan 13, 1982); People v. Souter 178 Cal. Rptr. 111 (Oct. 13, 1981, hearing denied Jan. 27, 1982); People ex rel Van De Kamp v. American Art Enterprises, Inc. 33 Cal. 3d 328, (Jan 31, 1983, rehearing denied Mar. 2, 1983); People v. Freeman 233 Cal. Rptr. 510 (Jan. 6, 1987, review granted Apr. 16, 1987); People v. Freeman 250 Cal. Rptr. 598 (Aug 25, 1988).

In view of the constitutional requirement of California Constitution Article VI §14 that the California Supreme Court's determinations must state the reasons (See Appendix D-1 and D-2 to this brief), the above described "hearing denied" rulings, considered collectively, strongly support Petitioners' contention that, upon remand, the independent state grounds relied upon in Freeman will be abandoned and People v. Souter must and will prevail.

(D) THE NEED FOR THIS COURT TO REVIEW THE "LEWD CONDUCT-FREE SPEECH" FEDERAL ISSUE IS EMERGENT. SUCH A REVIEW COULD NOT, UNDER ANY SET OF CIRCUMSTANCES, BE VIEWED AS AN "ADVISORY OPINION."

The petition herein at pages 32 and 49-54 describes an emergent need for this Honorable Court to resolve the federal "lewd conduct-free speech" controversy which this Court has avoided for the past 24 years. That it should occur in the background of these facts and the appellate court decision in People v. James Marvin Souter, Jr. 178 Cal.Rptr. 111 (Oct. 13, 1981, hearing denied Jan. 27, 1982) is pure poetic justice. Souter and the California community's failure to act in 1982 was,to a large degree, responsible for the seduction of Colleen Applegate in 1983-1984. See Exhibit 6 to the Brief Amicus Curiae of Phil and Karen Applegate in Fort Wayne Books, Inc. v. Indiana No. 87-470. The transcript of the PBS documentary "Death

of a Porn Queen" appears at Exhibit F-1 to F-36 to this brief. James Marvin Souter, Jr.'s participation in that seduction appears at Appendix F-7, F-8, F-11, and F-12.

The unresolved "lewd conduct- free speech" question continues to function as a "pimp" for Jim South's (World Modeling Agency) "pandering" operations.

If the rule of law laid down in James Phalen v. The Commonwealth of Virginia, 12 L. Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government...It is a principle of the Common Law, that the king cannot sanction a nuisance..."

is to continue to have meaning, the Petition for Writ of Certiorari herein should be granted, and the case set for briefing and oral argument.

Feb. 12, 1989.

Respectfully submitted,

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, Calif. 91352
(818) 352-2069

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on this 12th day of February, 1989, the original and 40 copies of the within PETITIONERS' SUPPLEMENTAL BRIEF were deposited in the United States Post Office in Van Nuys, California, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served, have been served:

Mr. Dennis A. Fischer
1448 15th Street, Suite 100
Santa Monica, California 90404

Lauren E. Dana
Office of the Attorney General
3580 Wilshire Blvd. Room 800
Los Angeles, California 90010

Ira Reiner
Office of the District Attorney
18-000 Criminal Court Building
210 West Temple Street
Los Angeles, California 90012

James K. Hahn
Office of the City Attorney
Hall E, Room 1800
Los Angeles, California 90012

JAMES J. CLANCY
9055 La Tuna Canyon Rd.
Sun Valley, Calif. 91352
(818) 352-2069
Attorney for Petitioners.

APPENDIX A

MEMORANDUM OPINION OF CIRCUIT JUSTICE O'CONNOR, FILED FEBRUARY 1, 1989, DENYING THE APPLICATION OF LOS ANGELES COUNTY DISTRICT ATTORNEY IRA REINER FOR A STAY OF THE ENFORCEMENT OF THE JUDGMENT ON THE GROUND THAT THE DECISION OF THE CALIFORNIA SUPREME COURT RESTS ON ADEQUATE AND INDEPENDENT GROUNDS.

(Reference: Petitioners' Supplemental Brief at page 1.)

SUPREME COURT OF THE UNITED STATES

No. A-602 (88-1054)

CALIFORNIA *v.* HAROLD FREEMAN

ON APPLICATION FOR STAY

[February 1, 1989]

JUSTICE O'CONNOR, Circuit Justice.

The State of California requests that, as Circuit Justice, I stay the enforcement of the judgment of the Supreme Court of California pursuant to 28 U. S. C. § 2101(f) pending the disposition of a petition for certiorari (No. 88-1054) to review that judgment. Because I think it unlikely that four Justices would vote to grant certiorari, see *Hicks* v. *Feiock*, 479 U. S. 1305, 1306 (1986) (in chambers opinion), I deny the application for issuance of a stay.

In its petition for certiorari, California seeks review of the State Supreme Court's judgment reversing the conviction of respondent Freeman for pandering under California Penal Code § 266i. *People* v. *Freeman*, 46 Cal. 3d 419, 758 P. 2d 1128 (1988). Freeman is a producer and director of pornographic films who hired and paid adults to perform sexual acts before his film cameras. In 1983, Freeman was arrested and charged with five counts of pandering based on the hiring of five such performers. He was not charged with violation of any of California's obscenity laws. Freeman was tried before a jury and convicted on all five counts of pandering; the State Court of Appeal affirmed the judgment of conviction. *People* v. *Freeman*, 198 Cal. App. 3d 292, 233 Cal. Rptr. 510 (1988).

On discretionary review, the California Supreme Court first considered the relevant statutory language of the State Penal Code. In relevant part, § 266i of the Penal Code provides that a person is guilty of felonious pandering if that per-

son "procures another person for the purpose of prostitution . . . ." Prostitution, in turn, is defined in § 647(b) of the Penal Code as "any lewd act between persons for money or other consideration." Finally, "'for a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*'" 46 Cal. 3d, at 424, 758 P. 2d, at 1130 (emphasis in original), quoting *People* v. *Hill*, 103 Cal. App. 3d 525, 534–535, 163 Cal. Rptr. 99, 105 (1980).

Interpreting these definitions of terms relevant to the state pandering statute, the State Supreme Court held that "in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*" 46 Cal. 3d, at 424, 758 P. 2d, at 1131 (emphasis in original). Applying this principle to Freeman, the court characterized the payments made to the performers as "acting fees" and held that "there is no evidence that [Freeman] paid the acting fees for the purposes of sexual arousal or gratification, his own or the actors'." *Id.*, at 424–425, 758 P. 2d, at 1131. Thus, the court held, "[Freeman] did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution." *Ibid.* In the succeeding section of its opinion, the California Supreme Court went on to observe that "even if [Freeman's] conduct could somehow be found to come within the definition of 'prostitution' literally, the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values." *Ibid.*

California, in its petition for certiorari, would have us review this First Amendment holding of the State Supreme Court. I recognize that the State has a strong interest in controlling prostitution within its jurisdiction and, at some

point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed. I do not, however, think it likely that four Justices would vote to grant the petition because in my view this Court lacks jurisdiction to hear the petition. It appears "clear from the face of the [California Supreme Court's] opinion," *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), that its analysis of the pandering provision of the State Penal Code constitutes an adequate and independent state ground of decision. Interpretations of state law by a State's highest court are, of course, binding upon this Court. *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). Here, the California Supreme Court has decided that Freeman's hiring and paying of performers for pornographic films does not constitute pandering under §266i of the California Penal Code. That is an adequate ground for reversing Freeman's conviction.

As I read the State Supreme Court's opinion, it is independent of federal law as well. This Court has held that, where a state court has "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did . . . we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide . . . 'suits according to its own local law.'" *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977), quoting *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950). This does not appear to be such a case.

The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled "First Amendment Considerations." The state court's discussion of the language of the Penal Code, which concludes with the clear holding quoted above, is not "interwoven with the federal law."

Michigan v. *Long*, *supra*, at 1040. Discussion of federal law—specifically the First Amendment—is strictly confined to the second subsection and constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid. *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

There is language early in the California Supreme Court's discussion section observing that "the prosecution of [Freeman] under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort." 46 Cal. 3d, at 423, 758 P. 2d, at 1130. Nevertheless, in light of the subsequent clear holding based exclusively on the state pandering statute, as well as the State Supreme Court's doubts in its discussion of the First Amendment whether "[Freeman's] conduct could *somehow* be found to come within the definition of 'prostitution' literally." *id.*, at 425, 758 P. 2d, at 1131 (emphasis added), I conclude that the state court's statutory holding is independent from its discussion of the First Amendment and was not driven by that discussion. Because the decision of the California Supreme Court rests on an adequate and independent state ground, the State of California's application for a stay of enforcement of the judgment of the California Supreme Court is denied.

So ordered.

APPENDIX B

COPY OF "DEPUBLISHED" OPINION OF THE COURT OF APPEAL, SECOND DISTRICT, DIVISION 3, IN PEOPLE V. JAMES MARVIN SOUTER ET AL, 178 CAL. RPTR. 111, DECIDED OCTOBER 13, 1981, HEARING DENIED BY THE CALIFORNIA SUPREME COURT ON JANUARY 27, 1982, WHICH ORDERED THAT THE OPINION BE NOT OFFICIALLY PUBLISHED.

(Reference: Petitioners' Supplemental Brief at pages 2, 4, 6, 7, 13, 16, and 18.)

The PEOPLE, Plaintiff and Appellant,

v.

James Marvin SOUTER, Jr., Mike Stephen Henderson, and Royce Shepard, Defendants and Respondents.

Cr. 39149.

Court of Appeal, Second District, Division 3.

Oct. 13, 1981.

Rehearing Denied Nov. 9, 1981.

Hearing Denied Jan. 27, 1982.*

LUI, Associate Justice.

Statement of the Case

A preliminary hearing was conducted in the Municipal Court of the Los Angeles Judicial District subsequent to the filing of a felony complaint. At the conclusion of the preliminary hearing, each of the respondents was held to answer. An information was filed in the Los Angeles Superior Court charging each of the respondents with con-

---

* In denying hearing, the Supreme Court ordered that the opinion be not officially published.

spiracy (Pen.Code, § 182.2) [1] to commit pandering, a felony, in violation of section 266i (count I) and with violations of section 266i (counts II to V).[2]

Following arraignment and other proceedings in the superior court, the respondents' motion to set aside the information pursuant to section 995 was heard and submitted subject to additional testimony. On October 17, 1980, the superior court granted the respondents' motion to dismiss the information. The People appeal the granting of the motion to dismiss.[3]

---

1. Hereinafter all references are to the Penal Code unless otherwise indicated.

2. Count II charged respondent Royce Shepard ("Shepard") with procurement of Jolande Van Amersfoorth to become a prostitute; count III charged James Marvin Souter, Jr. ("Souter") and Shepard with procurement of Marilyn Petersen to become a prostitute, and counts IV and V charged all respondents with the procurement of Michelle Leroy to become a prostitute. The counts in the information alleged that the violations occurred in the months of February, May, June, and July 1979.

3. Section 1238, subdivision (a)(1), authorizes the People to appeal from an order setting aside an information.

Facts

We shall summarize the evidence presented at the preliminary hearing.[4] Respondent Souter (sometimes known as "South"), was connected with a business known as the World Modeling Agency ("World"). Barbara Sobel, Marilyn Petersen, Jolande Van Amersfoorth and Michelle Leroy each went to World seeking employment. At some stage in their contact with World, Souter offered them work in movies and referred them to either respondents Henderson and/or Shepard (sometimes known as "Sinclair").

Sobel contacted Henderson and Shepard and then made two movies. In the first film, Sobel performed oral copulation and sexual intercourse with a Caucasian actor portraying a dance instructor and was paid $100. Henderson was the cameraman and director of the film. A second film involving sex acts was made by Sobel in Palm Springs and directed by Shepard, Hender-

4. There is no material dispute as to the facts presented by the testimony of various witnesses at the preliminary hearing and discussed in the respective briefs filed by counsel.

son and Tom Cobb. Sobel was paid $300 by check and then flown back to Los Angeles by Henderson. Upon her return to Los Angeles, Sobel contacted Souter, told him how much she was paid and said that she was upset about having had to perform sex with a black person.

Marilyn Peterson worked for World as a model for a couple of weekends over several months. Souter then suggested that she do a movie in which she would perform sex acts, including oral sex. Souter referred Petersen to Shepard, who drove her to Palm Springs in May 1979. There she made a movie directed by Tom McQuade in which she performed sexual intercourse and oral sex for which she was paid $325. In June 1979, Souter contacted Peterson about making a commercial which actually turned out to be another film in which Petersen engaged in sex and for which she was paid $900.

In January 1978, Jolande Van Amersfoorth was introduced to Shepard by Souter at World's offices. Subsequently, she was paid $200 to make a movie which involved sex acts, including oral sex. She made a

second movie, also involving sex, for Shepard about a year later for which she was paid $200 or $250.

Michelle Leroy went to World in April 1979, where she met Souter. After agreeing to make a movie, she was given Shepard's phone number. She met Shepard, and discussed making a movie and the fee involved. She later made the movie involving sex acts and was paid by the cameraman. None of the respondents was present at the making of the first movie. Leroy made a second movie one or two months later which was arranged after discussions with Souter and Shepard. In the second movie, Leroy performed sexual intercourse and oral copulation. She was paid $300 by Henderson after she performed.

Some general statements can be made about the testimony concerning the films. The women engaged in sex acts with male actors who were also paid. They stated they were not prostitutes and that they performed the sex acts in the movies as actresses for money rather than for personal sexual gratification. In fact, the witness Petersen indicated that the male actors in

the films she made had difficulty maintaining sexual arousal or an erection. Prior to making the films, a story line and script were discussed. A director was present and artificial lighting was utilized. On several occasions, the women were provided wardrobes from which they selected clothing to be used in the films. Still photographs were occasionally taken during the filming. The filming took longer than normal sexual activity due to the shooting of the film and changing of cameras. In some instances, a filming session consumed up to five or six hours.

Tom McQuade, a professional cameraman, worked for and was paid by Shepard from 1978 until the preliminary hearing. During this period, he made approximately 30 films, all involving sex. He filmed movies involving Sobel, Van Amersfoorth, Petersen and Leroy. The sex acts depicted in the movies he filmed actually occurred and were not simulated. McQuade considered his employment as that of a professional film maker. He received his bachelor's degree in radio and television filming from the University of Maryland in 1975, worked

as an editor for commercial production houses and now freelances. McQuade stated that he made the films with high quality equipment and with the goal of achieving the highest quality given budgetary limitations.

Issue Presented

The issue presented in this appeal is whether persons who pay others to perform sexual activities in motion pictures can be prosecuted for pandering under section 266i.[5]

Discussion

The superior court based its order setting aside the information primarily on its interpretation that our Supreme Court's decision in *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483, is controlling in the instant case because the

---

5. Section 266i provides in pertinent part as follows: "Any person who: (a) procures another person for the purpose of prostitution; . . . is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for two, three, or four years."

First Amendment prohibits the use of the pandering statute where sexual activity is filmed for inclusion in a motion picture.[6] The lower court was of the opinion that the obscenity statutes and not the pandering statute should be utilized by the prosecution.

In *Barrows, supra*, the plaintiffs actor, actress, producer and director of the live theatrical play entitled "The Beard," were charged with disorderly conduct in violation of section 647, subdivision (a), and with speaking obscene words in a public place in

---

6. In making its ruling, the lower court expressed concern with the use of the pandering statute, which if made applicable herein, would subject to prosecution eminent producers, directors and world renowned artists portraying roles in classic works in motion pictures involving acts of sexual intercourse for compensation. The court below was also concerned with the applicability of the pandering statute to producers of a film which involved legitimate medical research on human sexuality if persons were compensated for performing acts of sexual intercourse to be depicted in the film.

violation of section 311.6[7] for their participation in a live theatrical performance. The asserted lewd act was a simulation of an act of oral copulation.

Our Supreme Court's decision in *Barrows* is directed at a statutory interpretation of sections 647, subdivision (a), and 311.6. *Barrows* indicates that these two sections are not applicable to live theatrical performances. The trial court's reliance on *Barrows* to allow respondents immunity from prosecution under the pandering statute is misplaced..

In *Barrows*, our Supreme Court stated, 1 Cal.3d at pages 830–831, 83 Cal.Rptr. 819, 464 P.2d 483: "Our holding here does not

---

7. Section 647, subdivision (a), provides, "[e]very person who . . . solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view" shall be guilty of disorderly conduct, a misdemeanor.

Section 311.6 then provided: "Every person who knowingly sings or speaks any obscene song, ballad, or other words, in any public place is guilty of a misdemeanor."

suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course of a theatrical play. *Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero.....* [*In re Giannini* (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535] makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.2d at p. 572, 72 Cal.Rptr. 655, 446 P.2d 535.) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theater and cinema. The loss to culture and to First Amendment rights would be equally tragic." (Emphasis added.)

Barrows protects the right of the theater to portray conduct by simulated activity if the portrayal is not obscene. *Barrows* does not offer the cloak of First

Amendment protection to actual activity which violates the law. *Barrows* does not protect the producer of a theatrical play or motion picture who employs an artist to commit a crime to intensify the drama depicted therein. The solicitation of an artist to commit an actual violation of our penal statutes is not protected by virtue of its depiction in a play or movie. Thus, the procurement of a person to commit an act of sexual intercourse or oral copulation for compensation is a violation of the pandering statute even if depicted in a play or movie.

Respondents' reliance on the First Amendment of the United States Constitution and the California Constitution article I, section 2, is misplaced. The prosecution here is focused on the conduct in making the film and not on prohibiting the communication of ideas, impressions or feelings. Here, we are not faced with questions related to the dissemination or exhibition of the films which would require scrutiny under the First Amendment. Instead, our attention is directed to the manner in which the material incorporated in the film was originally obtained. (See *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363.)

Respondents next argue that the activities engaged in by the models did not constitute acts of prostitution under our Supreme Court's recent decision of *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636. We are not persuaded by respondents' arguments that *Pryor* is applicable in the instant case. Section 647, subdivision (b), provides that: "Every person ... [w]ho solicits or who engages in any act of prostitution" is guilty of disorderly conduct, a misdemeanor. As used in this subdivision, " 'prostitution' *includes* any lewd act between persons for money or other consideration." (Emphasis added.) In *Pryor*, our Supreme Court prescribed a new construction of section 647, subdivision (a),[8] "to establish a specific, constitutionally definite test of what conduct does or does not violate [section 647, subdivision (a)]." (*Pryor, supra*, 25 Cal.3d at p. 258, 158 Cal.Rptr. 330, 599 P.2d 636.)

That new construction was as to the term

---

8. *Ibid.*, footnote 7.

"lewd and dissolute"[9] conduct and not to the term "prostitution." Section 647, subdivision (b), prohibits prostitution which *includes* any "lewd act" for money or other consideration. In our view, an act of sexual intercourse or oral copulation for compensation is prostitution. Other acts which do not involve sexual intercourse or oral copulation *may* require reference to the *Pryor* definition of "lewd and dissolute" conduct to determine whether such acts constitute acts of prostitution. But, such is not the

---

9. The *Pryor* court stated the following construction of section 647, subdivision (a): "The terms 'lewd' and 'dissolute' in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view." (*Pryor, supra*, 25 Cal.3d at pp. 256–257, 158 Cal.Rptr. 330, 599 P.2d 636.)

case here.

Respondents also rely on *People v. Hill* (1980) 103 Cal.App.3d 525, 163 Cal.Rptr. 99. *Hill* involved the prosecution of a defendant for pimping and pandering. The defendant procured a 17-year old male, Eugene, for an undercover police officer. The officer testified that Hill offered Eugene for sex acts and that Eugene agreed to perform acts of oral copulation and sodomy for $300. Hill and Eugene both testified that Eugene's services would be solely for a nude photo session for which the officer was to pay $40. Therefore, a factual dispute was present in *Hill* as to what services were offered by the defendant, viz, nude modeling or oral copulation and sodomy. Consequently, the *Hill* court reversed the conviction on the failure of the trial court to instruct the jury, *sua sponte*, on the defendant's asserted defense that Eugene's services were offered solely for nude modeling for photographs. The *Hill* court's concern was directed at that part of section 647, subdivision (b), which states that prostitution includes any "lewd act." The *Hill* court declined to choose the definition of prostitution proposed by earli-

er Court of Appeal decisions in *Fixler, supra, People v. Grow* (1978) 84 Cal.App.3d 310, 148 Cal.Rptr. 648, and *People v. Schultz* (1965) 238 Cal.App.2d 804, 48 Cal.Rptr. 328, but relied on the *Pryor* test of "lewd or dissolute conduct" because a factual dispute was present as to whether any *touching* of Eugene was to occur by virtue of the negotiations between Hill, Eugene and the undercover officer. The court in *Hill* stated: "As we have pointed out herein, nude modeling for photographic purposes, which involves no bodily contact between model and photographer, does not fall within the concept of prostitution. Such conduct by the model cannot be deemed a 'lewd' act between persons for money in light of the views of the California Supreme Court set forth in the *Pryor* case." (*Hill, supra*, 103 Cal.App.3d 525, 536, 163 Cal.Rptr. 99.)

In the instant case, there is no such factual dispute as was present in *Hill*. The testimony at the preliminary hearing was unrebutted as to the type of activity involved in these films—sexual intercourse and oral copulation. Consequently, we need not refer to that part of section 647, subdi-

vision (b), which states that "prostitution *includes* any lewd act between persons for money or other consideration."

Section 266i contains no definition of prostitution. Section 647, subdivision (b), states "[a]s used in *this subdivision*, 'prostitution' includes any lewd act between persons for money or other consideration." (Emphasis added.) The language of section 647, subdivision (b), is expressly limited to that subdivision by its own terms and should not be read into section 266i in the absence of a specific reference.

In our view, the term "prostitution" as used in section 266i means performing acts of sexual intercourse for compensation. It is not our intent to set forth a definition of prostitution and to state all the possible variations of activity which could be encompassed within the term. We approve the definition set forth in Black's Law Dictionary (5th ed. 1979), which states at page 1100, "prostitution is performing an act of sexual intercourse for hire, or offering or agreeing to perform an act of sexual intercourse or any unlawful sexual act for hire." This is a clear and concise definition of the

term prostitution which is not subject to question and which would include within its meaning both acts of sexual intercourse and oral copulation as is present in the instant case.

Thus, section 266i is violated if a person procures another person to commit an act of sexual intercourse or oral copulation for compensation.

Respondents also assert that the use of the pandering statute in the instant case is unfair and violates notions of due process because respondents could not reasonably have been on notice that the statute would be utilized in the prosecution of their activity. This argument is untenable. *Fixler, supra*, and *People ex rel Van de Kamp v. American Art Enterprises, Inc.* (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, unequivocally held that sexual intercourse for hire by models whose activity is photographed for publications is prostitution. *Fixler* approved the use of section 266i to prosecute a photo editor and a photographer who had been hired to perform sexual activity for compensation while being photographed. There is no essential difference

between the shooting of photographs for publications and filming for production of movies. The procurement of models to perform the acts in question falls squarely within the ambit of section 266i. As stated in *People v. Lax* (1971) 20 Cal.App.3d 481, 487, 97 Cal.Rptr. 722: " 'The Statute [section 266i] endeavors "to cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned." [Citing *People v. Montgomery* (1941) 47 Cal.App.2d 1, 24, 117 P.2d 437 and *People v. Charles* (1963) 218 Cal.App.2d 812, 816, 32 Cal.Rptr. 653.]' "

We interpret section 266i to effect the intent and objective of the Legislature, which must be to prohibit the procurement of persons to perform sexual activity in exchange for money. As stated in section 4, "[t]he rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

Finally, respondent Henderson contends that the trial court below improperly denied his motion to dismiss for lack of sufficient evidence. According to the rule governing appellate review, we must view the evidence in the light most favorable to upholding the magistrate's decision and if there is any competent evidence in the transcript which would justify the magistrate's entertaining a reasonable belief that defendants had committed a felony, a motion to set aside should have been denied. (*People v. Haybron* (1980) 108 Cal.App.3d 31, 35, 166 Cal.Rptr. 264.) We have reviewed the transcript of the preliminary hearing. In our view, the evidence is sufficient to sustain the magistrate's decision holding the respondent Henderson to answer.

The order granting the motion to dismiss the information as to each respondent is reversed.

KLEIN, P. J., and POTTER, J., concur.

APPENDIX C

COPY OF CALIFORNIA RULES OF COURT FOR PUBLICATION OF APPELLATE OPINIONS (RULES 976, 976.1, 977, and 978).

(Reference: Petitioners' Supplemental Brief at page 7.)

DIVISION III

Rules for Publication of Appellate Opinions

[Title 3, Miscellaneous Rules—Division III, Rules for Publication of Appellate Opinions; Division adopted by the Supreme Court effective January 1, 1964.]

Rule
976. Publication of appellate opinions
(a) [Supreme Court]
(b) [Standards for publication of opinions of other courts]
(c) [Publication procedure]
(d) [Superseded opinions]
(e) [Editing]
976.1. Partial publication experiment
(a) [Partial publication authorized]
(b) [Other copies available]
(c) [Copy to Reporter of Decisions]
(d) [Repealed]
977. Citation of unpublished opinions prohibited; opinions ordered published by Supreme Court
(a) [Unpublished opinions]
(b) [Exceptions]
(c) [Citation procedure]
(d) [Opinions ordered published by Supreme Court]
978. Requesting publication of unpublished opinions
(a) [Request procedure; action by court rendering opinion]
(b) [Action by Supreme Court]
(c) [Effect of Supreme Court order for publication]

Cross References:
Appellate rules: Rules 1 et seq.

Collateral References:
Witkin Procedure (3d ed) Appeal §§ 578 et seq.; Courts § 151.
Cal Jur 3d (Rev) Courts § 209.
Cal Digest of Official Reports 3d Series, Courts § 31.

Rule 976. Publication of appellate opinions

(a) [Supreme Court] All opinions of the Supreme Court shall be

published in the Official Reports. (Subd (a) adopted effective January 1, 1964.)

(b) [Standards for publication of opinions of other courts] No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law. (Subd (b) as amended effective January 1, 1983; previously amended effective November 11, 1966, and January 1, 1972; adopted effective January 1, 1964.)

(c) [Publication procedure]

(1) [Courts of Appeal and appellate departments] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision's finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [Supreme Court] An opinion certified for publication shall not be published, and an opinion not so certified shall be published on an order of the Supreme Court to that effect. (Subd (c) as amended effective January 1, 1983; previously amended effective November 11, 1966, and January 1, 1972; adopted effective January 1, 1964.)

(d) [Superseded opinions] Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part. (Subd (d) as amended effective May 6, 1985; previously amended effective January 1, 1983; Subd (e) renumbered subd (d) effective January 1, 1972; adopted effective January 1, 1964.)

(e) [Editing] Written opinions of the Supreme Court, Courts of Appeal, and appellate departments of the superior courts shall be filed with the clerks of the respective courts. Two copies of each opinion of the Supreme Court, and two copies of each opinion of a Court of Appeal or of an appellate department of a superior court which the court has certified as meeting the standard for publication specified in subdivision (b) shall be furnished by the clerk to the Reporter of Decisions. The Reporter of Decisions shall edit the opinions for

publication as directed by the Supreme Court. Proof sheets of each opinion in the type to be used in printing the reports shall be submitted by the Reporter of Decisions to the court which prepared the opinion for examination, correction and final approval. (Subd (f) renumbered subd (e) effective January 1, 1972; previously amended effective November 11, 1966; adopted effective January 1, 1964.)

Rule 976 as amended effective May 6, 1985; previously amended effective November 11, 1966, January 1, 1972, January 1, 1983; adopted by the Supreme Court effective January 1, 1964.

Cross References:

Clerk of appellate court to transmit two copies of final judgment to Reporter of Decisions in accordance with this rule where opinion to be published: Rule 106.
Partial publication: Rule 976.1.
Unpublished opinions: Rules 977 et seq.
Requesting publication: Rule 978.
Publication and official advertising: Gov C §§ 6000 et seq.
Reporter of Decisions generally: Gov C §§ 68900–68905.

Collateral References:

Cal Jur 3d Appellate Review § 559.
Witkin Procedure (3d ed) Courts §§ 151, 256, 260, 301; Appeal §§ 33, 578 et seq., 695, 724, 770.
Cal Family Law Service §§ 35:108, 35:115.
Cal Practice Rev Ch 31 Default Judgments.
Calif Trial Handbook 2d (BW, 1987) 28:50.
Am Jur 2d Appeal and Error § 901.

Law Review Articles:

Internal workings and current concerns of the California Supreme Court. (1974) 62 CLR 309.
Censoring the law in California: Decertification revisited. (1979) 30 Hast LJ 1577.
Selective publication of case law. 39 SCLR 608.
Some reflections on the control of the publication of appellate court opinions. (1975) 27 Stan LR 791.

NOTES OF DECISIONS

The "all or nothing" character of the California Rules of Court governing publication of appellate opinions, required publication of the entire opinion, where one issue met publication criteria, although the remaining issues did not. People v Mask (1977) 66 CA3d 839, 136 Cal Rptr 283.

Rule 976.1. Partial publication experiment

(a) [Partial publication authorized] A majority of the court rendering an opinion may certify for publication any part of the opinion that meets the standard for publication specified under subdivision (b) of rule 976. The published part shall indicate that part of the opinion is unpublished. All material, factual and legal, that aids in the application or interpretation of the published part shall be in the published part.

(b) [Other rules applicable] For purposes of rules 976, 977, and 978, the published part of the opinion shall be treated as a published opinion, and the unpublished part as an unpublished opinion.

(c) [Copy to Reporter of Decisions] One extra copy of both the published and unpublished parts of the opinion shall be furnished by the clerk to the Reporter of Decisions.

(d) [Repealed effective January 1, 1984.]

Rule 976.1 as amended effective January 1, 1984; adopted effective January 1, 1983.

Collateral References:
Witkin Procedure (3d ed) Appeal §§ 586, 588, 589.

Law Review Articles:
Appellate court reform; desirability of minimizing written opinions. 4 Pacific LJ 22.

Rule 977. Citation of unpublished opinions prohibited; opinions ordered published by Supreme Court

(a) [Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b). (Subd (a) as amended effective January 1, 1983; adopted effective January 1, 1974.)

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding. (Subd (b) as amended effective January 1, 1983; adopted effective January 1, 1974.)

(c) [Citation procedure] A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation. (Subd (c) as amended effective January 1, 1983; adopted effective January 1, 1974.)

(d) [Opinions ordered published by Supreme Court] An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable. (Subd (d) adopted effective May 6, 1985.)

Rule 977 as amended effective May 6, 1985; previously amended effective January 1, 1974, and January 1, 1983; adopted by the Supreme Court and by the Judicial Council effective January 1, 1974.

Editor's Note—Subdivision (d) as adopted by the Supreme Court included the following as a footnote: "Any citation to the Court of Appeal opinion shall include reference to the grant of review and any subsequent action by the Supreme Court."

Collateral References:
Witkin Procedure (3d ed) Courts § 256; Appeal §§ 583 et seq., 695, 717, 724.

Forms:
Calif Criminal Forms & Instructions (BW, 1983) § 1:9.

Law Review Articles:

Use of unreported cases in California. 24 Hast LJ 37.

Some reflections on the control of the publication of appellate court opinions. (1975) 27 Stan LR 791.

The unpublished appellate opinion. 48 St BJ 387.

NOTES OF DECISIONS

Cal. Rules of Court, rule 977, providing that a nonpublished opinion of the Court of Appeal or of an appellate department of the Superior Court shall not be cited by a court or by a party in any other action or proceeding, does not prohibit appellate consideration of the opinion on its merits where the unpublished decision was cited to the trial court and where it was considered by the parties and the trial court and made a part of the record on appeal for the purpose of apprising the reviewing court of the trial court's reasons for its decision. Gray v Kay (1975) 47 CA3d 562, 120 Cal Rptr 915.

An appeal by a county employees retirement board from a judgment of the trial court holding that it had abused its discretion in rejecting a hearing officer's finding that an employee was entitled to service connected disability could not be said to be frivolous so as to subject the board to penalties, where the appeal, on its face, raised substantial issues requiring more than a cursory inspection. The fact that the board had raised the same issue on a prior appeal that resulted in an unpublished opinion could not be considered since Cal. Rules of Court, rule 977, by explicitly disallowing citation to unpublished opinions, establishes that they are not to be considered of precedential value. Hanson v Marin County Employees Retirement Board (1976) 63 CA3d 421, 133 Cal Rptr 809.

When an appellate court has given a direction in a particular cause, that direction establishes the law of the case and is binding on the trial court when it takes further proceedings in the same cause; however, this rule does not apply to unpublished opinions, which, in general, should not be cited by a court or by a party in any other action or proceeding (Cal. Rules of Court, rule 977). Thus, a justice court did not act in excess of jurisdiction by refusing, in a drunk driving case, to follow two cited decisions of the appellate department of the superior court determining that a docket entry does not meet the requirements applicable to the taking of a plea of guilty to a misdemeanor. Nelson v Justice Court (1978) 86 CA3d 64, 150 Cal Rptr 39.

Unpublished cases of the California Court of Appeal are not to be cited or considered of precedential value. Palm v Rangg (1981) 114 CA3d 967, 171 Cal Rptr 149.

Rule 978. Requesting publication of unpublished opinions

(a) [Request procedure; action by court rendering opinion] A request by any person for publication of an opinion not certified for publication may be made only to the court that rendered the opinion. The request shall be made promptly by letter, with a copy to each party to the action or proceedion not joining therein, stating concisely why the opinion meets one or more of the publication standards. If the court does not, or by reason of the decision's finality as to that court cannot, grant the request, the court shall transmit the request and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court shall also send a copy of its recommendation and reasons to each party and to any person who has requested publication. (Subd (a) as amended effective January 1, 1983; adopted effective July 1, 1975.)

(b) [Action by Supreme Court] When a request for publication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion published or deny the request. The

court shall send notice of its action to the transmitting court, each party, and any person who has requested publication. (Subd (b) as amended effective January 1, 1983; adopted effective July 1, 1975.)

(c) [Effect of Supreme Court order for publication] An order of the Supreme Court directing publication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion. (Adopted effective July 1, 1975.)

Rule 978 as amended effective January 1, 1983; adopted by the Supreme Court and by the Judicial Council effective July 1, 1975.

Cross References:

Citation of unpublished opinions: Rule 977.
Publication and official advertising: Gov C §§ 6000 et seq.
Publication of appellate opinions: Gov C §§ 68902–68905.

Collateral References:

Witkin Procedure (3d ed) Courts § 256; Appeal §§ 581, 586.

APPENDIX D

COPY OF PAGES 521-532 OF "CALIFORNIA CIVIL APPELLATE PRACTICE, SECOND EDITION (CONTINUING ST. BAR, 1985)", CONTAINING AN ANALYSIS OF CALIFORNIA SUPREME COURT'S PUBLICATION OF APPELLATE OPINIONS, AND A CRITICISM OF ITS PRACTICE OF DEPUBLISHING OPINIONS AFTER DENYING A PETITION FOR A HEARING OF AN APPEAL.)

(Reference: Petitioners' Supplemental Brief at pages 9, 10, and 18.)

II. WRITTEN OPINIONS

§20.2 A. When Opinions Must Be in Writing

Decisions of the California Supreme Court and courts of appeal that determine "causes" must be in writing with the court's reasons stated. Cal Const art VI, §14. Opinions of the superior court appellate departments, which are not mentioned in Cal Const art VI, §14, may be written whenever their authors deem it advisable or in the public interest (Cal Rules of Ct 106).

The term "causes" has been interpreted to mean decisions on the merits. 6 Witkin, California Procedure, *Appeal* §493 (2d ed 1971). As a practical matter, "cause" has generally been defined by what is *not* a cause. The most common appellate decisions deemed to be not on the merits, and thus not requiring a written opinion, are:

(1) An appellate court's action denying without opinion a petition for writ of mandate or prohibition. *People v Medina* (1972) 6 C3d 484, 490, 99 CR 630, 633; *Funeral Directors Ass'n v Board of Funeral Directors & Embalmers* (1943) 22 C2d 104, 106, 136 P2d 785, 786; 6 Witkin, Procedure, *Appeal* §493. When the appellate court does issue an alternative writ or order to show cause, however, the matter becomes a "cause," and it must be decided in writing with reasons stated. *People v Medina, supra.* The same rule applies to petitions for habeas corpus. See *In re Mazoros* (1977) 76 CA3d 50, 52, 142 CR 609, 610;

(2) An order dismissing an appeal or an original proceeding, as well as decisions on other motions (see chap 10 for discussion of motions). 6 Witkin, Procedure, *Appeal* §493. See *People v Brown* (1957) 149 CA2d 175, 176, 307 P2d 949;

(3) A supreme court order denying review or rehearing. *Metropolitan Water Dist. v Adams* (1942) 19 C2d 463, 468, 122 P2d 257, 259; 6 Witkin, Procedure, *Appeal* §493.

§20.3 B. Statement of the Court's Reasons

Courts are required to state reasons to support their written decisions. Cal Const art VI, §14. It can be argued that courts fail to support their written decisions when they do not address all the legal issues raised by an appellant. For example, an opinion may treat three of four substantial legal issues raised by an appellant, and either ignore the fourth or simply declare it to be without merit—or the court may

give reasons for its resolution of only some of the legal arguments pertaining to an issue. An example of a court of appeal opinion that the California Supreme Court found in violation of Cal Const art VI, §14 is *People v Pruitt* (Ct App, Nov. 12, 1981, 3 Crim 11036), court of appeal order filed May 28, 1981, in which the supreme court granted a petition for hearing and retransferred the case to the court of appeal "with directions to render a decision with reasons stated in conformity with article VI, section 14 of the California Constitution." The court of appeal opinion had merely stated that the court had "carefully considered the record and [found] that it belies [appellant's] contention."

The courts, however, have generally refused to infer a requirement that all issues raised by appellant be addressed in the opinion. One appellate court has defined "determine causes" (Cal Const art VI, §14) to mean "disposing of the judgment or the order of the trial court and not [of] every corollary legal issue that may somehow be involved." *People v Rojas* (1981) 118 CA3d 288, 289, 174 CR 91, 92. (On rehearing, the court declined to discuss issues omitted from the earlier decision and instead used the rehearing as a vehicle to define "determine causes.")

Many opinions have discussed fewer than all the issues and have summarily dismissed the others. See, *e.g., Linhart v Nelson* (1976) 18 C3d 641, 645, 134 CR 813, 815 (judgment affirmed; "[h]aving examined defendants' other contentions, we find them of insufficient merit to warrant discussion"); *Forde v County of Los Angeles* (1976) 64 CA3d 477, 479 n1, 134 CR 549, 551 n1 (judgment affirmed; appellant's other issues "more than adequately refuted in defendants' brief and do not justify detailed discussion"). Further, if the appellate court reverses a decision, it need discuss only the issue on which it based its reversal. *Holmes v Rogers* (1859) 13 C 191, 202; *People v Rojas, supra;* 6 Witkin, California Procedure, *Appeal* §496 (2d ed 1971).

Although the guidelines are unclear, a minimal level of adequacy seems necessary to satisfy the spirit as well as the letter of Cal Const art VI, §14. It can be argued that an appellant's rights under the due process clauses of the state (Cal Const art I, §§12, 15) and federal (US Const amends V, XIV) constitutions are also violated when an appellate court arbitrarily ignores a legal issue that a litigant seeks to have reviewed as a matter of right, and that, if resolved in his or her favor, would entitle that party to some relief. When opinions fall below the minimal level, appellants may wish to request relief when

petitioning for rehearing to the court of appeal and, if appropriate, review by the California Supreme Court.

III. PUBLICATION OF OPINIONS

§20.4 A. Selective Publication

Between 1909 and 1963, publication of all supreme court and court of appeal opinions was required by statute. See Strauss, *Written Opinions*, 39 Cal SBJ 127 (1964) (reviewing California law on the publication of appellate opinions between 1849 and 1964); 6 Witkin, California Procedure, *Appeal* §506 (2d ed 1971). However, as a result of proposals for selective publication advanced by various commentators and supported by the State Bar, the legislature amended Govt C §68895 (now Govt C §68902) in 1963 to provide that publication of appellate court opinions is to be governed by rules of the supreme court. See Note, *Selective Publication of Case Law*, 39 S Cal L Rev 608 (1966); Strauss, 39 Cal SBJ 127. Under this authority, and that of Cal Const art VI, §16 (now §14), the supreme court adopted Cal Rules of Ct 976, which provides that all supreme court opinions are to be published but that publication of court of appeal or superior court appellate department decisions is to be limited to those that meet certain criteria (discussed in §20.6). In addition, Cal Rules of Ct 976.1 provides for partial publication of opinions. See §20.7.

§20.5 B. Publication of California Supreme Court Opinions

Under Cal Rules of Ct 976(a) all supreme court opinions "shall be published in the Official Reports." Although supreme court orders are not published in the bound volumes of the Official Reports, they are published as minutes at the back of the green pages of each unbound advance sheet of the Official Reports.

In some cases the supreme court concludes, after independent consideration, that the appellate court opinion correctly states the law. If it does, it may adopt and republish, sometimes with modifications, the prior opinion. See, *e.g.*, *Doers v Golden Gate Bridge Highway & Transp. Dist.* (1979) 23 C3d 180, 151 CR 837; *Estate of McDill* (1975) 14 C3d 831, 834, 122 CR 754, 755 (describing in a footnote the court's method for designating its modifications of the lower court's opinion). In rare instances, the court has simply adopted by reference those portions of the appellate court's opinion that "present no new

and important issue of law and were correctly resolved by the Court of Appeal" (*People v Ford* (1981) 30 C3d 209, 215, 178 CR 196, 199), or has written its own opinion on one or more issues and incorporated by reference the lower court's opinion on the remaining issues.

Under the version of Cal Rules of Ct 976(d) in effect as this chapter goes to press, the supreme court's order granting a hearing vacates the opinion in the lower court, and it is thereafter routinely omitted from the Official Reports. See §20.12. The practice of incorporation by reference has thus created a body of California case law that is entitled to precedential effect (see 30 C3d at 216, 178 CR at 200), yet that is not published in the Official Reports despite the mandate of Cal Rules of Ct 976(a). Chief Justice Bird's dissent in *Ford* points out that incorporation by reference does not allow readers to "discern the decision and legal reasoning" of the court. 30 C3d at 219, 178 CR at 201.

The practice of incorporating a court of appeal opinion by reference should not be needed in cases decided under Cal Const art VI, §12(b), which was added (effective May 6, 1985) to allow the supreme court to review selected issues from the court of appeal decision. Moreover, if the practice does continue, it is not likely to have the undesirable effect of creating unpublished precedent, because it seems probable that Cal Rules of Ct 976(d) will be amended to permit the publication of court of appeal opinions in cases accepted for supreme court review. See §20.12.

§20.6 C. Standards for Publishing Lower Court Opinions; Decision To Publish

Before 1972, the California Rules of Court encouraged publication. Former Cal Rules of Ct 976(b) provided that an appellate opinion was to be published if it met the criteria of former Cal Rules of Ct 976(c), which stated that every court of appeal opinion was deemed to meet the standards for publication unless a majority of the court rendering the opinion ordered otherwise. See West's Cal Rules of Ct 976 (historical note); 6 Witkin, California Procedure, *Appeal* §508 (2d ed 1971).

The current rules discourage publication. Under new Cal Rules of Ct 976(b), a court may not order an opinion published unless it meets one of the following criteria: (1) establishes a new rule of law; (2) applies an existing rule to a set of facts significantly different from

those in other published opinions; (3) modifies or criticizes an existing rule; (4) resolves or creates an apparent conflict in the law; (5) involves a legal issue of continuing public interest; or (6) makes a significant contribution by reviewing the development of a common law rule, constitutional provision, statute, or other written law.

§20.7 D. Partial Publication

The majority of a reviewing court may certify only part of an opinion for publication. Cal Rules of Ct 976.1(a). This partial publication rule was first enacted as an experiment in 1983 (see former Cal Rules of Ct 976.1(a)), and was made permanent as of January 1, 1984.

Appellate courts presumably are to publish the portion of the opinion that meets the criteria for publication. See Cal Rules of Ct 976(b). See also Report of the Chief Justice's Advisory Committee for an Effective Publication Rule p 31 (1979). Rule 976.1 itself contains no specific guidelines.

When only part of an opinion is published, the published part must state that there is an unpublished portion, and must include all material that aids in applying or interpreting the published opinion. Cal Rules of Ct 976.1(a). For purposes of Cal Rules of Ct 976, 977, and 978, the unpublished part of the opinion is treated the same as opinions that are totally unpublished. Cal Rules of Ct 976.1(b) (discussed in §20.11).

§20.8 E. Procedures for Publication and Nonpublication

The court of appeal or superior court appellate department that decides a case determines initially whether the decision will be published. Cal Rules of Ct 976(c)(1). Both that court and the supreme court can reverse this initial decision and order that an opinion previously certified for publication not be published, or that an opinion previously ordered not published be certified for publication. Cal Rules of Ct 976(c)(2), 978. The terms "depublication" and "decertification" are commonly used to refer to the decision not to publish. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 n1 (1984).

Although the standard the court of appeal or superior court appellate department applies in deciding whether to publish its opinion is spelled out in Cal Rules of Ct 976–978 and in the published manual on court of appeal procedures, Internal Operating Practices and Procedures (1979), there are no written guidelines concerning the mechanics of

making that decision. One common procedure is for the author of the opinion to indicate a preference to the other members of the court; if the author desires publication and at least one of the other panel judges concurs, the decision will be published. For a discussion of this and other methods, see Kanner & Uelmen, *Random Assignment, Random Justice*, 6 LA Law 10, 13 (1984).

When the opinion is filed, it is marked either "Certified for Publication" or "Not to be Published in the Official Reports." The court must certify the opinion for publication before the decision is final as to that court or it will lose jurisdiction to order publication. Cal Rules of Ct 24, 976(c)(1).

If an opinion is designated not for publication, anyone (not just a party to the litigation) may request by letter that the opinion be published. Cal Rules of Ct 978(a). The person making the request must (1) state why the opinion meets publication standards, (2) send copies to all parties, and (3) file the letter with the court that rendered the opinion. Cal Rules of Ct 978(a). When that court either denies the request or has lost jurisdiction to act on it because the decision has become final as to that court (see Cal Rules of Ct 24, 976(c)(1)), the court must send the request and a copy of the opinion to the supreme court with its recommendation and a brief statement of reasons for its determination. Cal Rules of Ct 978(a). The court sending the request must also send a copy of its recommendation and reasons to each party and to the person who requested publication. Cal Rules of Ct 978(a). When the supreme court receives the request it must either order the opinion published or deny the request, and it must send a copy of its action to the lower court, each party, and the person who requested publication. Cal Rules of Ct 978(b).

There is no provision in Cal Rules of Ct 976–978 for requests to depublish an opinion. However, such requests have been included in petitions for rehearing or hearing, or are submitted to the court of appeal or supreme court in letter form. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 n1 (1984). Because there are no rules prescribing the procedure to follow in requesting a court to issue a depublication order, counsel presumably may follow the procedures for requesting publication described in Cal Rules of Ct 978(a).

A party who asks the supreme court for review of the court of appeal decision may request that the opinion be ordered depublished under Rule 976(c)(2) should the petition be denied. Moreover, the supreme court may order publication or depublication on its own

motion. Cal Rules of Ct 976(c)(2); Grodin, 72 Cal L Rev 514 n1. For further discussion of supreme court depublication practice, see §20.10.

§20.9 F. Considerations in Requesting Publication or Nonpublication

Counsel should consider whether it is to the client's advantage to obtain publication or nonpublication of an opinion in any given case. Although a losing party is unlikely to want the opinion published, some attorneys request publication because they believe that publication increases the chance of obtaining review by the supreme court. Statistics indicate that in 1978 almost 68 percent of the supreme court hearings were granted in cases in which the opinion was published, whereas only about 15 percent of the opinions issued by the courts of appeal that year were published. See Annual Report of the Administrative Office of the California Courts p 59 (1979); Annual Report p 64 (1980); Report of the Chief Justice's Advisory Committee for an Effective Publication Rule p 12 n14 (1979).

That two thirds of the supreme court's caseload came from the published 15 percent of appellate decisions supports the conventional wisdom that the mere fact of publication may persuade the supreme court to take a case it would have rejected if unpublished. However, this disparity may reflect the fact that both the decision to publish and the supreme court's decision granting review single out cases that present substantial legal issues. In addition, the supreme court need not review a decision to eliminate the precedential value of an opinion with which it disagrees, since it need only order it depublished. See §20.10 on the effect of the supreme court's order to depublish a case.

If the client may be affected by the decision in a similar case, or is a member of an affected group, he or she can have a considerable stake in seeing that the opinion is published or unpublished, as the case may be. This is particularly true of institutional litigants because, for example, a published opinion sharply cutting back on governmental immunity from tort liability, or imposing on certain industries a stricter duty of care in maintaining safe premises, could be highly detrimental to government agencies, corporations, or insurance companies. See §20.8 for discussion of requests by nonparties.

Clients may also be concerned about their privacy. For example, victims in rape or incest cases may want their names removed from an opinion, and other clients may not want their names or details about their finances published. Possible solutions include asking the

court to remove personal information unnecessary to the opinion or, if the information is related to fewer than all legal questions, to request partial publication to omit that part of the opinion containing personal information. See, *e.g., Board of Educ. v Jack M.* (1977) 19 C3d 691, 131 CR 700 (school board sued teacher, who had been arrested for homosexual solicitation, to establish its right to discharge him from tenured position); *People v S. P.* (1981) 115 CA3d Supp 12, 170 CR 478 (the prosecution appealed from an order from the municipal court dismissing a charge against defendant, who had been arrested for homosexual solicitation). See also Formichi, California Style Manual: A Handbook of Legal Style for California Courts and Lawyers §§213–214 (2d ed 1977).

The prime example of the importance of publication is the so-called test case, in which the principal reason for the litigation is to obtain a ruling that will thereafter apply to a broad class of persons. A request for publication in a test case can be based on Cal Rules of Ct 976(b), which authorizes publication if an opinion establishes a new rule of law or applies an existing rule to a set of facts significantly different from those stated in previously published opinions.

Complications may arise if counsel perceives a conflict of interest concerning publication, *e.g.*, when the client's interests would be served best by nonpublication, but publication would greatly benefit a broader group that is also represented by counsel. In such cases, the wishes of the individual client should be followed.

Frequently, however, the client is not as concerned with publication as are certain interest groups that stand to gain or lose by having the decision and its reasoning published. See generally Biggs, *Censoring the Law in California: Decertification Reinstated*, 30 Hastings LJ 1577, 1580 (1979). Thus requests to publish opinions that have been certified for nonpublication (see Cal Rules of Ct 978(a)), or requests to decertify a published opinion, are occasionally made by strangers to the litigation.

§20.10 G. Effect of Supreme Court Order

A California Supreme Court order that a decision be published is not an expression of the correctness of that opinion. Cal Rules of Ct 978(c). However, the effect of the supreme court's order *not* to publish a decision is unclear.

Presumably, the supreme court issues some depublication orders because the opinions do not meet the criteria of Cal Rules of Ct

976(b). See Witkin, Manual on Appellate Court Opinions §22 (1977); Report of the Chief Justice's Advisory Committee for an Effective Publication Rule pp 24–26 (1979). However, in the great majority of cases, depublication is ordered "because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent." Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 (1984). See also Kanner, *The Unpublished Appellate Opinion: Friend or Foe?* 48 Cal SBJ 386, 443 n64 (1973); Kanner & Uelmen, *Random Assignment, Random Justice*, 6 LA Law 10 (1984). As of 1981, the supreme court was ordering the depublication of about 100 cases a year. See Gerstein, *Law by Elimination: Depublication in the California Supreme Court*, 67 Judicature 292, 294 n1 (1984).

The California Supreme Court's practice of depublishing lower court decisions of which it disapproves has come under attack from commentators since the early 1970s. Some of the reasons for criticizing this practice include: (1) there are no standards; (2) depublication decisions are frequently based on inadequate information and on no notice to the parties or other concerned persons; (3) the practice creates uncertainty in the law because the court gives no reasons for its decision; (4) the losing party is frequently left with an apparently incorrect or unreasoned judgment against him or her; (5) initial publication in the advance sheets, followed by an unnoticed depublication order in the subsequent history table, can be a trap for busy trial lawyers and judges; (6) the practice favors well-organized special interest groups at the expense of individuals who are unaware of the practice and its consequences; and (7) it results in the depublication of opinions that in fact meet the publication criteria of Cal Rules of Ct 976(b), including opinions that are sharply critical of existing rules of law. See Kanner, *The Unpublished Opinion*, 48 Cal SBJ at 391 n8; Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S Cal L Rev 1181 (1977); Witkin, Manual on Appellate Court Opinions §22; Biggs, *Censoring the Law in California: Decertification Revisited*, 30 Hastings LJ 1577 (1979); Report of the Chief Justice's Advisory Committee pp 24–27; Kanner & Uelmen, 6 LA Law 10; Gerstein, 67 Judicature 292, 294 n1.

After studying the problem, the Chief Justice's advisory committee recommended that the supreme court limit its depublication orders to those opinions that fail to meet the publication criteria of Cal Rules

of Ct 976(b). Report of the Chief Justice's Advisory Committee p 26. The supreme court, however, rejected the committee's recommendation and instead adopted Cal Rules of Ct 976(c), which permits the court to continue its practice of depublishing any court of appeal opinion without stating a reason. In 1984, Associate Justice Grodin of the California Supreme Court published an article answering some of the criticisms directed at the court's depublication practice and exploring several alternatives. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal L Rev 514 (1984).

The advisory committee also recommended that the court, when it grants a hearing, end its practice of automatically transferring the entire cause to itself for de novo review on all issues, and of vacating the court of appeal opinion and treating it as though it never existed. For discussion, see Report of the Chief Justice's Advisory Committee p 26. See also Comment, *The California Supreme Court and Selective Review*, 72 Cal L Rev 720 (1984). This recommendation was effectively carried into law by the adoption of Proposition 32 in November, 1984, amending Cal Const art VI, §12, effective May 6, 1985. For further discussion of this point, see §22.1.

IV. CITING OPINIONS AS PRECEDENT

§20.11 A. Unpublished Opinions

The court and counsel may not cite or rely on unpublished opinions unless they are relevant under the doctrines of the law of the case, res judicata, or collateral estoppel or when relevant to the same defendant or respondent in a criminal or disciplinary proceeding. Cal Rules of Ct 977(a), (b)(1)–(2).

California Rule of Court 977(a) does not specifically say that an unpublished opinion is unavailable as precedent. It says only that an unpublished opinion "shall not be *cited* by a court or party." *Gray v Kay* (1975) 47 CA3d 562, 566 n3, 120 CR 915, 918 n3. However, several cases state clearly that an unpublished opinion has no precedential value in California. See, *e.g.*, *Nelson v Justice Court* (1978) 86 CA3d 64, 66, 150 CR 39, 41; *Heaton v Marin County Employees Retirement Bd.* (1976) 63 CA3d 421, 431, 133 CR 809, 814; *Powers v Sissoev* (1974) 39 CA3d 865, 872 n8, 114 CR 868, 873 n8; *People v Gomez* (1972) 26 CA3d 928, 930, 103 CR 453, 454. The result is the same whether the opinion has been ordered not to be published by the issuing court or by the supreme court (see *Powers*), or has been vacated by the supreme court (before May 6, 1985; see §20.12)

in granting a hearing (see *Coalition for Los Angeles County Planning v Board of Supervisors* (1977) 76 CA3d 241, 250 n9, 142 CR 766, 772 n9; *People v Gomez, supra*). See also *People v Rogers* (1978) 21 C3d 542, 547, 146 CR 732, 735. But see *Gibson v Government Employees Ins. Co.* (1984) 162 CA3d 441, 446 n1, 208 CR 511, 514 n1 (opinion cites court of appeal opinion in case in which appeal was dismissed by stipulation of parties after grant of hearing but before supreme court opinion written).

Nonetheless, reviewing courts do occasionally discuss unpublished opinions, and the reasoning in them, on one ground or another. See, *e.g., People v Rogers, supra* (because the issue "was raised by the Court of Appeal, not by the parties"); *Bloom v Municipal Court* (1976) 16 C3d 71, 74 n2, 127 CR 317, 318 n2 (because of the importance of the issue); *People v Shuey* (1975) 13 C3d 835, 840, 120 CR 83, 87 (because of the importance of the issue to the judicial process).

Despite these exceptions to the mandate of Cal Rules of Ct 977, counsel should not rely on unpublished cases. Before relying on a case found in the advance sheets, counsel should consult the Cumulative Subsequent History Table in the back of the most recent Official Reports advance sheets to see whether the opinion has been superseded by a hearing (granted before May 6, 1985; see §20.12) or rehearing, modified, or ordered depublished. Of course, counsel is free to use the reasoning or authority in an unpublished opinion as long as the case itself is not cited to the court.

As stated in Rule 977, the ban against citation does not change the legal effect of a prior opinion for purposes of res judicata, collateral estoppel, or law of the case. See, *e.g., Vezina v Continental Cas. Co.* (1977) 66 CA3d 665, 667, 136 CR 198, 199 (when party invokes claim of collateral estoppel, trial court properly takes judicial notice of prior unpublished court of appeal opinion in the matter).

§20.12 B. Opinions in Cases in Which Rehearing, Supreme Court Review, or Other Judicial Action Ordered

Under the version of Cal Rules of Ct 976(d) in effect as this chapter goes to press, no opinion superseded by a hearing in the supreme court, a rehearing in the court of appeal, or other judicial action can be published. As a result, these opinions are treated like all other unpublished opinions and cannot be cited as precedent. See §20.11.

California Constitution art VI, §12 was amended, effective May 6, 1985, to add §12(b), which provides that the California Supreme Court "may review the decision of a court of appeal in any cause." The major effect of this amendment will be to permit the supreme court to review selected issues from the court of appeal decision rather than the entire case. See §22.1. Because not all issues decided in the court of appeal need be reviewed by the supreme court, the amendment will abrogate the rule that decisions of the court of appeal cannot be published (and thus cannot be cited) if the case is reviewed by the supreme court.

At the time this chapter goes to press, amendments to Cal Rules of Ct 976–977 to conform the rules to post-May 6, 1985, procedure have not been adopted and cannot be predicted with certainty. It seems likely, however, that decisions ordered published by the court of appeal will not automatically be depublished by acceptance for supreme court review and that published opinions may be given some precedential or advisory effect on issues not accepted for review by the supreme court.

Rule changes adopted before May 6, 1985, implementing the constitutional amendment will be discussed in §22.1. Readers should also consult the current version of the California Rules of Court for later changes. All future changes will be discussed in later supplements to this book.

APPENDIX E

COPY OF PAGES 743-747 OF 9 WITKIN, CALIFORNIA PROCEDURE, THIRD EDITION, CONTAINING A REVIEW OF APPELLATE DECISIONS WHICH HAVE EXPRESSED THE VIEW THAT THE DENIAL OF A PETITION FOR A HEARING BY THE CALIFORNIA SUPREME COURT IS SIGNIFICANT, AND HAS A SPECIAL MEANING.

(Reference: Petitioners' Supplemental Brief at page 17.)

CALIFORNIA PROCEDURE

Third Edition

by B. E. WITKIN
of the San Francisco Bar

Volume 9

BANCROFT-WHITNEY CO.
201 Brannan Street
San Francisco, California 94107

1985

(d) Effect of Denial of Review.

(1) [§775] View That Stronger Precedent Established.

Attorneys commonly regard court of appeal decisions in which hearings were denied as weightier precedents than those in which no hearing was sought. And many a court of appeal justice shares this view, as may be seen from numerous pronouncements to the

effect that such decisions come close to Supreme Court decisions as authority in the courts of appeal. The following are typical:

Bridges v. Fisk (1921) 53 C.A. 117, 122, 200 P. 71. "The decision, therefore, possesses all the authority of a pronouncement by the supreme court itself."

Masonic Mines Assn. v. Superior Court (1934) 136 C.A. 298, 300, 28 P.2d 691. "A transfer was denied by our Supreme Court and we are bound by the decision."

Walls v. System Freight Service (1949) 94 C.A.2d 702, 703, 211 P.2d 306. In view of denial of a hearing, "any statements" in a prior *Supreme Court decision* "were overruled by the later decision."

Allstot v. Long Beach (1951) 104 C.A.2d 441, 446, 231 P.2d 498. "So far as we are concerned, the denial of a hearing in a case which decides questions of such widespread interest and importance means that they were fully considered by the Supreme Court and were not deemed to have been decided incorrectly."

Housing Authority v. Peters (1953) 120 C.A.2d 615, 616, 261 P.2d 561. "Therefore we are bound by the foregoing decisions, the correct rule being that when the precise question of law has been decided by a District Court of Appeal and the Supreme Court has denied a hearing, such decision will be followed as settling the law in the absence of a later decision of the Supreme Court overruling or modifying the prior case."

Victory Oil Co. v. Hancock Oil Co. (1954) 125 C.A.2d 222, 228, 270 P.2d 604. "[I]t must be assumed that the Supreme Court thereby approved the unequivocal decision in Sahlender."

Barry v. Department of Public Works (1962) 199 C.A.2d 359, 360, 18 C.R. 637. "The Supreme Court having considered the same arguments which are now made to us, and having, by denial of hearing, apparently found them unconvincing, the appellants here are asking us not only to overrule the District Court of Appeal . . . but also effectually to overrule the Supreme Court. This we cannot do."

People v. Hasson (1968) 265 C.A.2d 865, 866, 71 C.R. 664. "In a case like the *Romo* case where the Court of Appeal was divided, . . . the failure of the Supreme Court to grant a hearing upon petition seems to us to be equivalent to a decision by that court in accordance with the majority opinion in the Court of Appeal." And "We are, of course, bound by holdings of the Supreme Court."

To similar effect are *Norwood v. Judd* (1949) 93 C.A.2d 276,

284, 288, 209 P.2d 24 [court declined to follow an earlier court of appeal decision in which no hearing was sought, on the ground that a later conflicting decision, in which a hearing was denied, had, in legal effect, overruled the first one]; *People v. Rowland* (1937) 19 C.A.2d 540, 542, 65 P.2d 1333; *Bock v. Oakland* (1937) 19 C.A.2d 115, 117, 65 P.2d 1098; *Clover v. Jackson* (1927) 81 C.A. 55, 59, 253 P. 187; *People v. Whitaker* (1924) 68 C.A. 7, 11, 228 P. 376; *Zerbe v. United Railroads* (1922) 56 C.A. 583, 586, 205 P. 887; *Estate of Brissel* (1963) 218 C.A.2d 841, 844, 32 C.R. 458 [rule of *Housing Authority v. Peters* "is well settled"]; *Levy v. Bellmar Enterprises* (1966) 241 C.A.2d 686, 692, 50 C.R. 842 [following *Housing Authority* case]; *Burns v. State Comp. Ins. Fund* (1968) 265 C.A.2d 98, 102, 71 C.R. 326; *In re Henley* (1970) 9 C.A.3d 924, 931, 88 C.R. 458, citing the text; *People v. Crafts* (1970) 13 C.A.3d 457, 459, 91 C.R. 563; *Knowles v. Work. Comp. App. Bd.* (1970) 10 C.A.3d 1027, 1032, 89 C.R. 356 [court of appeal decisions in which hearing was denied deemed to distinguish out of existence a prior Supreme Court decision]; *Maillet v. Work. Comp. App. Bd.* (1972) 23 C.A.3d 107, 110, 99 C.R. 925 [hearing in Supreme Court denied in prior case raising identical issue; decision stands as one of court of last resort]; *Phillips v. Bartolomie* (1975) 46 C.A.3d 346, 351, 121 C.R. 56 [denial of hearing is "not without significance," quoting *Di Genova*, infra, §776, and citing the text]; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1017, 140 C.R. 168, citing the text [same].

The contrary view was expressed in many cases, and that view was restated in the new rules *review* in the Supreme Court. (See infra, §776.)

(2) [§776] Contrary View.

During the early period, prior to the strong declarations discussed in the preceding section, the Supreme Court flatly rejected the notion that its discretionary denial of a hearing, for undisclosed reasons, could be interpreted as a positive approval, and adoption of the point of law decided by the court of appeal. Thus, in the leading case of *People v. Davis* (1905) 147 C. 346, 350, 81 P. 718, supra, §696, the court said that "the denial in any case . . . is *not to be taken as an expression of any opinion by this court*, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, *nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion.*"

Similarly, in *Bohn v. Bohn* (1913) 164 C. 532, 537, 129 P. 981, the opinion states: "But an order by this court, refusing to transfer a cause after judgment in the district court of appeal, does not adopt the opinion of the appellate court so as to give it, in this court, the authoritative effect which one of our own decisions would have." (See also *Western Lithograph Co. v. State Bd. of Equalization* (1938) 11 C.2d 156, 167, 78 P.2d 731; *In re Stevens* (1925) 197 C. 408, 423, 241 P. 88; *McMillan v. Greer* (1927) 85 C.A. 558, 563, 259 P. 995; *Prescod v. Unemp. Ins. App. Bd.* (1976) 57 C.A.3d 29, 39, 127 C.R. 540, citing the text; 13 So. Cal. L. Rev. 463.)

Practical evidence of the Supreme Court's view is furnished by examples of disapproval of cases in which a hearing was denied only a few years before the disapproving decision. (See, e.g., *Estate of Rattray* (1939) 13 C.2d 702, 716, 91 P.2d 1042 [repudiating rule of *Estate of Miller* (1937) 23 C.A.2d 16, 71 P.2d 1117]; *Zaragosa v. Craven* (1949) 33 C.2d 315, 320, 202 P.2d 73 [repudiating holding of *Franklin v. Franklin* (1945) 67 C.A.2d 717, 155 P.2d 637]; *Lewis & Queen v. Ball Sons* (1957) 48 C.2d 141, 154, 308 P.2d 713 [disapproving *Marchett v. Gould* (1955) 131 C.A.2d 821, 281 P.2d 524]; *People v. Butler* (1966) 64 C.2d 842, 845, 52 C.R. 4, 415 P.2d 819 [disapproving *Arata v. Superior Court* (1957) 153 C.A.2d 767, 315 P.2d 473, and its progeny].)

Nevertheless, the Supreme Court has never undertaken to examine and expressly reject the view espoused by the formidable list of court of appeal opinions (supra, §775), and some time ago, took a middle position which perhaps indicates a change of thought: "Although this court's denial of a hearing is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of this court . . . it does not follow that such a denial is without significance as to our views." (*Di Genova v. State Bd. of Education* (1962) 57 C.2d 167, 178, 18 C.R. 369, 367 P.2d 865.)

A difficult situation arose when courts of appeal, interpreting and applying Supreme Court decisions, rendered decisions limiting their effect. If the Supreme Court denied hearings in these cases, did this indicate acquiescence in their results and retreat from the rule announced in its own decision? In *People v. Triggs* (1973) 8 C.3d 884, 890, 106 C.R. 408, 506 P.2d 232, the court emphatically rejected this notion:

"Preliminarily we declare that our refusal to grant a hearing in

a particular case is to be given no weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this court. Our statements of law remain binding on the trial and appellate courts of this state . . . and must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which we have declared the applicable principle of law. Our refusal to grant a hearing in any given case must not be deemed a sub silentio overruling of our prior decisions.'" (8 C.3d 890.)

The latest word on this subject appears in the Comment of the Advisory Committee on revised Rule 28 (supra, §711). After observing that "[i]t has long been established in California law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause" (citing *People v. Davis* and *People v. Triggs*, supra), the Committee states: "Adoption of the new 'review' procedure does not affect this legal doctrine, and denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion."

APPENDIX F

COPY OF TRANSCRIPT OF THE FRONTLINE P.B.S. DOCUMENTARY, "DEATH OF A PORN QUEEN", CONCERNING THE TWO YEAR PERIOD IN THE LIFE OF COLLEEN APPLEGATE FROM HER INITIATION INTO THE PORNOGRAPHIC TRADE AT AGE 18 BY JAMES MARVIN SOUTER, THE DEFENDANT IN PEOPLE V. SOUTER ET AL (JIM SOUTH OF WORLD MODELING AGENCY IN FREEMAN CASE) TO HER DEATH AT AGE 20 IN MARCH OF 1984.

(Reference: Petitioners' Supplemental Brief at page 20. See also pages F-7, F-8, F-11 and F-12).

FRONTLINE

CONTENTS: Death of a Porn Queen

Introduction	1
Text	1
Production Credits	32
WGBH Publications and Video/Film Services	34

She was from Minnesota. Young, pretty and fresh. She went to Hollywood in search of a dream, and found herself in X-rated movies, on drugs, and estranged from her family and friends. After two years as a porn queen, she took her own life and left only questions about how this could happen.

INTRODUCTION

NARRATOR
Tonight on FRONTLINE. A girl from Minnesota becomes the star of porn films.

BOBBY HOLLANDER
She enjoyed the recognition. She enjoyed the money.

NARRATOR
An eighteen-year-old innocent looking for adventure and finding a world of money, drugs, and sex in front of cameras.

LAURIE SMITH
Colleen Appplegate did not like doing sex on film. Period.

BOBBY HOLLANDER
She chose to do it. She could have stopped.

NARRATOR
A young life ends with a gunshot and questions. Tonight: "Death of a Porn Queen."

JUDY WOODRUFF
Good evening. This is the story of an ordinary young woman who wandered into a strange world and died. It's also about dreams, values, choices... families and children...and drugs. And, it's about pornography. Not pornography's effect on those who see or hear it...but about some of the people who work in that "industry" and its effect on them.

The program contains some partial nudity and graphic scenes and language which may offend some viewers. It is not suitable for viewing by children. We recommend parental discretion.

The program is called "Death of a Porn Queen," produced for FRONTLINE by Andy Greenspan, directed by Paul Henschel and reported by Al Austin of WCCO-TV in Minneapolis.

NARRATOR
This is where the story ends--Palm Springs, California, early in the evening, March 21, 1984. A young woman lay thrashing on her bed with a bullet wound through her temple. A rifle lay beside her.

BRENDA ROUSENOU, Friend
I went over to her, and she was laying there, there was like two mattresses pushed together on the bed and there was like a crease and there was blood going all the way down the crease, but you couldn't see any blood on her, and...

DOCTOR
Her condition was hopeless. She was comatose and she was going to die.

Jackson, Detective: *Het, Elner, could I see the weapon in the Applegate shooting, please? Okay, this is the weapon that was found at her side.*

Interviewer: *How do you think she shot herself?*

Jackson: *She would have been laying down on the bed, with the gun on the bed, propped on her arm, possibly with her thumb or other finger to the gun and the bullet would have passed through her head and into the wall where we found it.*

NARRATOR
She was known as Shauna Grant, a star of X-rated films, Her real name was Colleen. Colleen Applegate. From Farmington, Minnesota. She left home when she was 18. When she died, she was 20.

Colleen lived here for a while--an apartment house near Hollywood. In the spring of 1983, a few months before her death, she suddenly moved out.

Interviewer: *I wonder if she left anything here?*

Landlady: *Yeah, I have some things that I was to send to her mother, but never did. You're welcome to them.*

Interviewer: *She got two of these.*

Landlady: *Pictures, and terrible books. A lot of pictures.*

Interviewer: *What's this one?*

Landlady: *Let's see here. She was pretty. Very pretty.*

Interviewer: *That's a beautiful picture.*

Landlady: *Yeah. Hmmmm.*

Interviewer: *Was that what she looked like?*

Landlady: *Yeah, yeah. Her hair is a little longer, a little big longer than shoulder length. Blonde, like strawberry blonde. Very pretty. These are just, you know, I guess her high school things.*

Interviewer: *A diploma.*

Landlady: *Yeah. Diploma, letterz, school letters. I guess they were for cheerleading.*

NARRATOR
High school diploma, old snapshots and valentines, her confirmation certificate from the Catholic Church...and a copy of *Hustler* magazine with her picture on the cover. These are like the belongings of two people, as though Shauna Grant had kept Colleen Applegate's things, dragged them with her from place to place...and finally left them behind.

When did one person become the other? How does an ordinary small town girl like Colleen Applegate become a Hollywood porn queen? And then what happened to her? She shot herself. But why? How did she get so far from home?

THERESA SICHENEDER, Friend
She was an everyday girl, just like everybody else. I mean, she was in cheerleading, I was in cheerleading...

NARRATOR
Theresa Sicheneder was one of Colleen's closest friends from the sixth grade on.

THERESA SICHENEDER
She always appeared happier than she was. I remember that she was so unpredictable. You never knew what she was thinking. You never knew what she was going to do next unless she'd share it with you.

PHIL APPLEGATE, Father
Colleen was more private or more inside of herself I think than our other kids have been.

NARRATOR
Colleen's parents, Phil and Karen, still live in Southern Minnesota. Recently, they divorced.

KAREN APPLEGATE, Mother
I was very strict with Colleen. To me, right's right, and wrong's wrong. It still is. But as long as it doesn't go too wrong, they're going to do what they want to do anyway.

PHIL APPLEGATE
I maybe tried to run the house like a business. And I realize that isn't a good way to run the house sometimes. Maybe I come off that way, but I learned over the years too, but I think when she was going to high school she was in...I expected certain things. I realize I was a tough father. I wasn't an easy father. And I don't know whether that was a mistake or not, because I was just as tough on the other kids, too.

KAREN APPLEGATE
She was the oldest of five. But there was nothing strange or abnormal about her childhood. It was an average childhood. She loved to read. She used to write poems. She spent more time reading than watching TV. She wasn't very good at house cleaning, but she liked to cook. Our relationship with Colleen was fine until her junior and senior year. Then we had a lot of arguments.

NARRATOR
At about that time, she began to date a boy named Mike Marcell, who was two years older.

THERESA SICHENEDER
She started liking boys, and showing it. And she knew that she could get almost anyone she wanted to. I think that's when she really started liking boys.

Brenda Rosenou: *This was her graduation year, Colleen?*

Colleen Behir: *Yeah.*

Brenda Rosenou: *Because this is the year we graduated. '81. She wrote on the back page, "Brenda, it's been a long time, hasn't it?"*

NARRATOR
Two of Colleen's oldest friends live now in Southern California. Brenda Rosenou and Colleen Hehir. They grew up with her and both moved to California at about the same time she did and stayed in touch with her to the end.

Brenda Rosenou: *"...no matter how far we are apart, we'll always be close at heart, and we'll always keep in touch, even if one of us ends up in dumb-fuck Egypt. But anyway, I think I've used up enough space. Be good, Brenda, keep smiling and don't do anything I wouldn't do. Love, Lena." God, it's been a long time since I read that.*

Colleen Hehir: *I think she was a little bit different. She had different ideas, I think, than anybody else. She had these dreams of what she wanted, and she wanted to be a model. And back then we didn't really have set dreams or goals. And she did.*

Brenda Rosenou: *It was a small town you know, population of what was it, 4800 people at the time?*

Colleen Hehir: *Now. It was even less then.*

Brenda Rosenou: *Yeah. And everybody knew what you were doing before you did it. There was never really anything to do.*

Colleen Hehir: *I think it bored everybody.*

Brenda Rosenou: *Yeah.*

NARRATOR
Colleen stayed in Farmington a while after high school working first as a cashier, then as an employee of the telephone company. There, one night in December, she swallowed a bottle of pills. She was rushed to the hospital.

Phil Applegate: *We took her to the emergency. And they pumped her stomach. It was basically that...it wasn't so much that she wanted to kill herself as it was that she wanted some attention, and she thought that was a way of getting it.*

Interviewer: *Did you and Colleen ever talk about it?*

Phil Applegate: *To be honest, no, I don't think we did. I don't think we really sat down and talked about it. We went to the counselor with her as a family.*

Karen Applegate: *And then they had one group session—with the whole family. All of us were in there. And they tried to get us to talk, of course, we're all sitting there and looking at each other. Nobody's saying much. And I was very angry. I don't...I still don't feel that she took that...maybe that was the beginning sign and I didn't know it, of a problem. I thought she did it for attention.*

After she took the pills, living in a small town can really be the pits sometimes. A lot of people were talking about it. And a lot of people were on her case. She wanted to get out of here.

NARRATOR
Colleen and her boyfriend, Mike Marcell, headed west.

Interviewer: *Why do you think she went to California?*

Phil Applegate: *To be somebody.*

NARRATOR
Los Angeles, that first spring, was no more fertile ground for Colleen's vague ambitions than Farmington, Minnesota had been.

Brenda Rosenou: *All I know was that I had talked to her a couple of times and they couldn't...neither one of them were having very good luck finding a job. And Mike was getting real upset. He wanted her to find a job, because he couldn't get a job.*

And he found, from what she told me, he's the one that found the ad for modeling.

Colleen Hehir: *It was just in the newspaper.*

JIM SOUTH, World Modeling Agency
It's two girls, one guy simulation. Yeah. There's no colored guys. Hello? Okay. He needs you at ten a.m. Friday.

NARRATOR
This is the man that Colleen went to see in the spring of 1982. His name is Jim South.

JIM SOUTH
Can you write this early in the morning?

NARRATOR
He runs an agency called "World Modeling."

JIM SOUTH
What we do is we're licensed to get you work with professional photographers. The majority of the work we get is nude photographic modeling. The pay does run from one hundred a day to fifteen hundred a day depending on who's shooting you. Now the two different type shootings we have--we have single girl--you modeling alone, like you see in Penthouse. We also have simulation, you lucky devil.

NARRATOR
A documentary crew led by Wendy Apple shot these scenes of South as he interviewed a new model named Kim.

JIM SOUTH
...you are touching. You look like you're doing something but you're not.

WENDY APPLE, Documentary Producer
Jim South is indeed an agent.

NARRATOR
Apple was making a film called "Fallen Angels."

WENDY APPLE
And he is absolutely the medium, the way in which girls who know nothing about Hollywood or movies or pornography come into the porno industry. They have to pass through him--they don't have to but that's the way his business is set up.

JIM SOUTH
Give me a shot of you close to the stool with your right foot on the bottom ledge.

WENDY APPLE
He said that he can get new girls work very fast. There's always a job for a new girl.

NARRATOR
South showed his Polaroids of Colleen Applegate to *Penthouse* photographer Steve Hicks.

Steve Hicks: *Up, down, up, down, up, down.*

STEVE HICKS, Penthouse Photographer
I don't equate what I do with X-rated films, whatsoever. I mean, what I do is photograph women and attempt to create beauty out of their bodies.

Steve Hicks: *Okay, why don't you stand again. Stand and let me see you bring, start to bring your jeans down a little bit, just slowly. Keep going. I'll tell you when to stop.*

STEVE HICKS
Colleen, was, was a beautiful girl. Um, and I think very unaware of it. Um, you know, she was the type of girl that when she walked in, she looked in many ways like she just came right off the farm. But in makeup she was a very beautiful girl. And she really took to modeling quickly. You know, it's unfortunate that Mother Nature put 18-year-old girls on this planet with beautiful bodies because you know the mind of a typical 18-year-old is not prepared to make the right decisions in this town with these opportunities.

NARRATOR
Hicks advised Colleen to get out of nude modeling quickly because it leads downhill. After all the magazines have used her, the only thing left is X-rated movies. She ignored the advice and soon was posing for raunchier magazines.

Colleen Hehir: *And she invited us up so we went to her house for the weekend and that's when we found out.*

Brenda Rosenou: *That's the first time we saw the pictures and all that.*

Interviewer: *What sort of pictures were they?*

Brenda Rosenou: *Shocking pictures.*

Colleen Hehir: *We didn't expect...*

Brenda Rosenou: *We didn't know, you know, when she said modeling and then she finally told us it was nude. Well, you think of like Playboy, you know, and then the pictures we saw though were like, from...*

Colleen Hehir: *More hard core pictures.*

Brenda Rosenou: *Yeah, like Erotica and what was that other magazine? Velvet, stuff like that. And she just had the Polaroids, the instant pictures of her and some guys. They were pretty...We both, you know, she just pulled them out and starting showing them to us and we just looked at each other and our mouths were like down to our knees.*

Colleen Hehir: *She didn't explain it. She had been kind of covering it up.*

Brenda Rosenou: *She didn't come right out and say, "Well I did this with this guy and I did this with this girl."*

She, she um, you could tell she felt bad because she wouldn't tell us the whole story, you know. And then, you know, it even went so far as her trying to convince us to do it with her.

Colleen Hehir: *You know, making it so it wouldn't be as bad.*

Brenda Rosenou: *Yeah.*

Interviewer: *What would she say to that?*

Colleen Hehir: *She had appointments set up with her manager to go in and the whole bit and we're just like "Well, I don't think so."*

Brenda Rosenou: *She said it was easy and...*

Colleen Hehir: *She said well, just go and talk to him. You know. It's good money, you know, you can just do it like on the weekends. Come out here and you don't have to take your clothes off if you don't want to.*

Brenda Rosenou: *Which, you know, seeing the pictures you knew you would have to take your clothes off.*

Interviewer: *How important do you think it was to Colleen that you approve of what she was doing.*

Brenda Rosenou: *I think it was real important.*

Colleen Hehir: *Very, very important to her.*

Brenda Rosenou: *Because I think she knew that nobody that was in her life before did approve.*

STEVE HICKS
You know, you take the typical girl that's used to working at MacDonald's or at the shoe store making a minimum wage and suddenly she's given the opportunity to get made up and be in front of people that tell her she's beautiful and make as much money in a day as she was making in three weeks, and they change. They change. And that's sad.

NARRATOR
Mike Marcell, Colleen's boyfriend, soon left her and returned to Minnesota where he spread the news that Colleen was involved in pornography. Marcell won't discuss it now. He says he just doesn't care about her.

The Applegates heard the stories about their daughter and flew at once to Los Angeles.

PHIL APPLEGATE
We knew that she was working through this World Model Agency, so we went up to the offices up there and saw Jim South and saw what was going on and asked if Colleen worked for him and he said yes and then he said well she's

PHIL APPLEGATE (Cont.)
right in there and he threw this book at us. And there was nude photographs of Colleen you know, among other girls and I guess you could come in and pick who you wanted to model for you and that's how they...And we said how can you let an 18-year-old girl involved in this? Well, she's 18 and she's of age of consent and blah, blah, blah.

COLLEEN HEHIR
They wanted her to come home and they were like ordering her you know, giving her no choice, which I think was a mistake because she didn't listen to them in high school, why would she listen to them now?

Interviewer: *And did that cause a rift between you?*

Karen Applegate: *Yes, I didn't hear from her for...well, it seemed like eternity but it was probably two months. I didn't hear a word and I didn't know where to call her. I mean I left there and then all the way home I kept thinking why did we do that. We could have, you know, found out where she was living, found something. I didn't know how to find her.*

Jim South: *Okay. I'm at 4523 Van Nuys Boulevard. Now it is a small office building. It's suite 203.*

NARRATOR
By this time, Colleen had posed for almost every men's magazine.

Jim South: *Could you come in tomorrow? Well, what's convenient for you?*

NARRATOR
Producer Wendy Apple happened to be filming in South's office when Colleen dropped in.

Jim South: *Okay, have a good time. I'll see you tomorrow. Bye.*

Okay, well, we're, you and I are gonna undress and we're...you don't have enough money just be nice.

Colleen Applegate: *Who doesn't have enough money? You don't have enough money.*

Jim South: *World Modeling. Okay what's the name of the paper please you saw the ad in? Okay. May I ask your age?*

NARRATOR
Colleen was in South's office again when an adult film director named Bobby Hollander came in, looking for actresses for his next film.

BOBBY HOLLANDER, Adult Film Director
I wanted to use new girls who were just making the turnover. I didn't want to use a first-timer. And Colleen had done a piece prior to "Paper Dolls," just one. We sat and talked and she was wearing jeans, no shoes and a sweatshirt, and sitting on a table top. And I just got good vibes from her and she received good vibes from me. And I said this is gonna be easy.

It's all a matter of dollars and cents now. "Well," she said, "well I don't know about that." I said, "Well, what you don't know about, don't be ashamed to ask me. Because I like you. I don't want to take you to bed. Let's be friends." And in this business, she felt, wow, there's somebody that doesn't, you know, want to grab me. I've been in this a while. Those days are, they're past me already. You know, you don't have to sleep with anyone to get in the film. You have to sleep with them *on* the film.

"PAPER DOLLS" CLIP

Bobby Hollander: *Shauna, how old are you?*

Colleen Applegate: *I'll be 20 in a week.*

Bobby Hollander: *You'll be 20?*

Colleen Applegate: *Um hmm.*

Bobby Hollander: *I thought you were gonna be 19.*

Colleen Applegate: *No I am 19. I'll be 20.*

Bobby Hollander: *And how long have you been a paper doll?*

Colleen Applegate: *A paper doll?*

Bobby Hollander: *A model, a cover girl, a centerfold?*

"PAPER DOLLS" CLIP (Cont.)

Colleen Applegate: *About two months.*

Bobby Hollander: *Two months?*

Colleen Applegate: *Yeah.*

Bobby Hollander: *Did anybody twist your arm to get into the business?*

Colleen Applegate: *No not at all. It was all my idea.*

Bobby Hollander: *Really?*

Colleen Applegate: *Uh huh.*

NARRATOR
This is a scene from the first movie Colleen did with Bobby Hollander. He had renamed her Shauna Grant. She was not 19 but 18 at the time.

Bobby Hollander: *Are you still a virgin?*

Colleen Applegate: *No. Are you kidding?*

Bobby Hollander: *How old were you when you lost your virginity?*

Colleen Applegate *Almost 17.*

Bobby Hollander: *Almost 17. You almost lost it or you did lose it when...*

Colleen Applegate: *I did lose it when I was almost 17.*

BOBBY HOLLANDER
I said to her you have the capability of being a star. Because one day and it's going to happen fast, once they put a little makeup on you, put some high heels on your feet and stockings and a garter belt, like they do in the picture layouts, the public is going to fall in love with you.

LAURIE SMITH, Ex-porn Star
Bobby could talk a nun into doing a porno movie.

NARRATOR
Laurie Smith is a veteran adult film actress and make-up artist. She became Colleen's closest friend. After Colleen died, Laurie gave up acting and moved away from California.

LAURIE SMITH
You know, I always look like such an elegant lady on film, and I'm still like a little kid, a little tomboy in my real life. I never changed. From the day I came from Huntington Beach, I'm still a little beach bum girl.

SCENE FROM "NIGHT MAGIC"

Man: *I love it when you touch me there.*

Laurie Smith: *When I touch you where, Chuck?*

LAURIE SMITH
But in movies, give me a whip and put some make-up on me and I could say lick my boots to anybody.

NARRATOR
Laurie transformed Colleen.

LAURIE SMITH
When I first met her she was frumpy, schoolgirlish, wore funny, funny clothes and plain, and just didn't know about make-up, never really wore make-up, and just never, just kind of, you know, this kind of person.

"CENTERFOLD CELEBRITY" OUTTAKES

Colleen Applegate: *Production stills here we go.*

Jamie Gillis: *We kiss in a shadow...*

Laurie Smith: *Are you ready to go like this?*

Colleen Applegate: *Let's see a pose.*

LAURIE SMITH
Then after I was finished with her, her shoulders were back and her back was arched and her chin was up and she'd flip her hair around. And she would just...she became sexy. She became Shauna Grant.

BOBBY HOLLANDER
She looked like peaches and cream nude. Naked peaches and cream. And it was that Minnesota upbringing.

"SUMMER CAMP GIRLS" CLIP

Colleen Applegate: *This is the farthest I've been away from home on my own.*

Herschel Savage: *That's crazy.*

Colleen Applegate: *I haven't been anywhere.*

LAURIE SMITH
She got her little act down, you know, little girl from Minnesota and you know, up 'til the very end she used to say that I like wonder how many more years I'm going to get away with this Minnesota act.

Colleen Hehir: *We would tell her well you know if you want to get out...*

Brenda Rosenou: *There's another choice really...*

Colleen Hehir: *You can come stay with us. We'll find you a job. You know, letting her know that wasn't the only thing that there was for her. We couldn't tell her what to do. She was happy doing what she was doing. We were her friends. All we could do was back her up.*

Interviewer: *When you invited her to come live with you and to get a good job what did she say?*

Brenda Rosenou: *She always told me well "what could I do?" She goes, "I can't do anything. I can't type. I can't do this. I can't do that." You know she was...*

Colleen Hehir: *...not really putting forth the effort.*

Brenda Rosenou: *Yeah.*

Colleen Hehir: *Making up excuses. Well, I can't right now. I have this coming up. It pays real good. You know, and see--that's just it. Nothing that she could do would compare to the money she was making.*

Brenda Rosenou: *Yeah.*

Colleen Hehir: *And I think that was a big issue.*

"THE PERSONAL TOUCH" CLIP

Bobby Hollander: *And before I blast off my mouth and go any further let me introduce you to one of the stars of the business, Miss Shauna Grant.*

Colleen Applegate: *Hi.*

Bobby Hollander: *Hi, love.*

Colleen: *How ya doing? Thanks for the intro. Just write me and I'll send you a personally autographed picture.*

Bobby Hollander: *I thought she was adorable. I thought she was cute. I took a liking to her. I wanted to see it happen, where she got what she deserved, where she wasn't abused.*

Interviewer: *Any mind tricks she used to get through those sex scenes?*

Laurie Smith: *No. We'd just get high. We just always got high before we did it.*

NARRATOR
Colleen had begun to use cocaine. She returned to Minnesota for a visit in the fall. Her friend Theresa met her at the Twin Cities Airport.

THERESA SICHENEDER
The first time I saw her when she came back was when she got off the plane ...She wasn't really Colleen, the Colleen I knew. She seemed very uppity. You know, a little jumpy. Like she was a little anxious and the first thing she wanted to do was go into the bathroom and, you know, get a snort of coke.

KAREN APPLEGATE
She...her eyes looked wild. She wore a lot of make-up...and her hair--she was always very fussy about her hair, but she just--it was just brushed. It wasn't really fixed. She just, like she, just looked hard. She just

KAREN APPLEGATE (Cont.)
didn't look like herself at all.

PHIL APPLEGATE
And the subject of drugs--I guess I brought the subject up. I said I hope you're not involved in and staying away from all this cocaine and things like that. I said you really don't need that. And she said, "Oh you don't have to worry, dad," she says, "I go to parties where that's at but I don't do that." And because I'm a parent, I guess, and because it's my child, I guess I wanted to believe her.

KAREN APPLEGATE
I just didn't like what she was doing. She was flaunting her portfolio or whatever. And the pictures she showed me in the portfolio weren't nude pictures but they were very flattering pictures. But she hardly had anything on. And she wanted to give me one. She wanted me to pick one out. And she'd have, you know, give it to me. And I told her I didn't want any of those pictures.

NARRATOR
Magazines with Colleen's nude pictures had reached the stores in Farmington. In the high school, Colleen's younger sister found one of those pictures taped to her locker. Colleen had become not a celebrity, but an embarrassment.

Brenda Rosenou: *She went back to go to a friend's wedding, that was one of those girls that hung around with us, and she was kind of worried, and the things they're saying and the girl's mother wouldn't even let her in.*

Colleen Hehir: *She wouldn't let her in the church.*

Brenda Rosenou: *They didn't want her around.*

CONSUMER ELECTRONICS SHOW, LAS VEGAS

Woman: *Mmmmm, that felt great!*

NARRATOR
Despite appearances, this is serious business. The Consumer Electronics Show in Las Vegas. Twice a year these exhibitions give the porn industry a chance to show off its new films and its stars to the nation's videotape

NARRATOR (Cont.)
dealers.

GENA FINE, Porn Star
Triple X kisses. For your office wall? What are your clients going to say?

NARRATOR
Americans rented a hundred million X-rated video cassettes last year. Most of the companies that produce them are represented here. They have a pool of about 400 actors and actresses who are willing to have sex on camera.

PORN AWARDS

Announcer: *And the winner is, "Blame It On Ginger."*

NARRATOR
The X-rated performers have their own version of the Academy Awards.

Announcer: *What is this for?*

Woman #1: *It's for best shot-on-video sex scene. I'm not quite sure which one it is though--which scene.*

Woman #2: *Well, the film is nomated, it's up for best specialty film.*

Man: *"Bizarre Encounters."*

Woman #2: *"Bizarre Encounters." It's uh, you describe it dear. How would you describe "Bizarre Encounters?"*

Man: *It's, it is the world's first how-to, instructional, black comedy, hard-core bondage-and-discipline tape.*

Woman #2: *Ha, ha, ha, ha, ha.*

Barbara Dare, Porn Star: *And if you think I was hot in '86, watch for '87.*

NARRATOR
Twenty-one-year-old Barbara Dare is voted best new performer.

BARBARA DARE
I went home one day, and a girlfriend of mine that I had for a long time was acting different. And I said, "Why, because of what I'm doing?" And I told them, I said, "When I come..." point blank--I said, "when I come back in a couple of years and I'm over a hundred thousand dollars to do what I want with and open up a business, and you shits are still doing the same thing and sitting in a bar doing nothing," I said, "then you'll talk."

NARRATOR
Jeanette Littledove is another newcomer to adult movies. She's 19, from Oklahoma.

JEANETTE LITTLEDOVE, Porn Star
It just messes with your mind. It's addictive. You can't quit. Once you get hold of the money and you know it's there. And it's easy to get to and you don't want to quit.

NARRATOR
In 1983, Colleen Applegate attended one of these shows as the porn industry's new star. She had been unwelcome at a friend's wedding in her home town. But here people lined up to have their picture taken with her.

Bobby Hollander: *She had a line of a minimum of 40 people at a time. She saw the recognition...*

Interviewer: *And she liked it?*

Bobby Hollander: *Yeah. She became Shauna Grant.*

Interviewer: *At that show?*

Bobby Hollander: *Yeah. She became Shauna Grant. But Shauna Grant always was Colleen Applegate. I don't know which scared her more.*

DANIELLE MARTIN, Porn Film Star
She was a little girl. She needed to be supported, you know, need to be told that everything was okay and that there were, you know, people there with her.

NARRATOR
Danielle Martin and Colleen began their X-rated acting careers at about the same time.

DANIELLE MARTIN
We met on a film, "Summer Camp Girls." She was like really nice, and we just started hanging out, best friends, very close.

You know, I will always make it on my own. And I know that. Even if everybody dumps me. But she couldn't, you know. She was holding on. She was too frightened to make her own decisions on what to do or anything like that.

"CENTERFOLD CELEBRITIES" OUTTAKE

Director: *Is your sound okay in there now? Okay fine. Slating "Centerfold Celebrities," Shauna and Jamie. Take one.*

Colleen Applegate: *Why would you want me to lay down?*

Jamie: *Well, just so you could be comfortable. I don't want you to strain.*

NARRATOR
Bobby Hollander directed Colleen in a series of hard core tapes that required only a day or two each to shoot.

LAURIE SMITH
Bobby is an okay person to work for. He's not pushy, mean, doesn't make you feel...I mean you may look cheap in the movie, but while you're doing it he makes you feel like a little queen, you know.

You know during the time you feel like you're doing "Gone With The Wind." So it's like one of those things. It's not hard for Bobby. He didn't talk her into it. She wanted to do it.

BOBBY HOLLANDER
Shauna was a talent. She was a star. There are stars in the business. Shauna Grant made herself a star in a short period of time, the quickest I've ever seen.

NARRATOR
Colleen's movies and modeling made her almost $100,000 in one year. She spent most of the money on cocaine.

LAURIE SMITH
She needed it like you feel like you need it, you know as a security blanket. I mean we just liked to do it. We did a lot though...she and I. That one year, in the year and a half actually that I really hung around with her a lot...'cause we'd always go in on it together and we always would buy a lot.

Bobby Hollander: *I may have done cocaine with both of them. But on selling either one...I wasn't selling cocaine. I was a user.*

Interviewer: *Did you give Colleen cocaine?*

Bobby Hollander: *I think I gave Colleen as much cocaine as she gave me.*

LAURIE SMITH
It was the perfect thing to have. You could go smoke a joint, unwind from the first scene and then right before you go you take a toot.

NARRATOR
These are outtakes from a movie Laurie and Colleen did with Bobby Hollander.

"PERSONAL TOUCH" OUTTAKES

Bobby Hollander: *She's gonna dust off the -- screen!!*

Laurie Smith *Okay!! I just--every time I, I mean, uuggghh!!*

LAURIE SMITH
Once I saw Bobby started freebasing--that was the last time I worked for Bobby and that was the last time I would ever work for him and I was really up--pissed off!!!

"PERSONAL TOUCH" OUTTAKES

Colleen Applegate: *I'm listening.*

"PERSONAL TOUCH" OUTTAKES (Cont.)

Bobby Hollander: *No, no. You ain't listening to shit.*

Laurie Smith: *We are listening to everything. You walk away.*

Colleen Applegate: *I know exactly...I'm listening.*

Bobby Hollander: *I don't want you to say anything. I just want you to listen to me.*

Laurie Smith: *Okay Bobby.*

Bobby Hollander: *Laurie, deep inhale.*

Laurie Smith: *I know, but let's get this...*

Bobby Hollander: *Doesn't that...okay do you see what--I think--you're saying this--you can read it right from the script.*

Laurie Smith: *I know exactly how you want it.*

LAURIE SMITH
He was just crazy. He couldn't make up his mind what he wanted to do. He had this script that he'd written probably when he was on his third day awake. But it was so sadistically disgusting. And I just said Colleen, forget it, just forget Bobby. Go off on your own. You got your name now. You're big enough where you can do it on your own.

Bobby Hollander: *I told you, yes we are shooting, we are shooting, we are rolling, we are rolling.*

NARRATOR
Bobby Hollander is on probation for cocaine possession. Each weekend he must clean up highways for the California Transportation Department.

BOBBY HOLLANDER
I've been here 16 or 17 days working with this crew. Some of the finest guys in the highway and freeway business.

NARRATOR
Colleen was making as much as $1,700 a day when sex scenes were shot.

LAURIE SMITH
She hated it. She hated it. She just laid there and just let it happen. Colleen Applegate did not like doing sex on film. Period.

JERRY BUTLER, Porn Star
She was just so overwhelming because I knew the girl did not want to be there. It was so shame--y'know, so shameful...

NARRATOR
Jerry Butler, one of Colleen's co-stars believed she did not belong in adult films, but others kept encouraging her.

JERRY BUTLER
Everybody said it was okay. Hey, put this skirt on. You look like a million, Colleen. Oh you look great. I mean, uh Shauna. You look fabulous. Oh, great. Take the picture. Oh, terrific. Oh, this is great. Oh, great sex scene. Oh, terrific. These are the people that are still alive. These are the people that made money, that are still making money off this poor little girl. Getting her to think that that's all she needed in life.

Bobby Hollander: *She enjoyed the recognition. She enjoyed the money. There's no question about that.*

Interviewer: *Okay, but she was an aimless girl, she was vulnerable. Don't you think that life is harmful to a person like that?*

Bobby Hollander: *That's a loaded question.*

Interviewer: *Yeah, it is.*

Bobby Hollander: *It's a loaded question. I think anyone who's in Colleen's age group, they're all in the same situation.*

Interviewer: *Okay.*

Bobby Hollander: *She chose, she chose to do it. She could have stopped, and made less money and just have been a photographer's model, but I personally think she enjoyed doing it. Colleen was an exhibitionist. Colleen was two different people on camera and off camera. Two different people. Jekyll and Hyde. Completely.*

Interviewer: *It was her choice. But wouldn't it have been better for her to stop?*

Bobby Hollander: *Well, talking about it today, yes, it would have been better.*

"CENTERFOLD CELEBRITIES" OUTTAKES

Colleen Applegate: *Can you tell someone to bring my bathrobe in here. I forgot to bring it in.*

NARRATOR
In that one year Colleen performed in over 30 X-rated movies. She had an abortion. She contracted herpes. She performed sex on camera with 37 men.

JAKE EHRLICH, Former Boyfriend
The thing I notice mostly about is how quiet it is here now. There used to be noise. There used to be life here.

NARRATOR
Jake Ehrlich is a former cocaine dealer. He returned to his home in Palm Springs, California, this winter after almost three years in prison.

JAKE EHRLICH
There's just an empty feeling, you know, as if I left, you know last week. And coming back to absolutely zero.

Now you see how our bedroom was set up. Used to keep the stereo over there. And there's a patch there that bothers me. That's the patch the police pulled out. They made a patch and someone tried to patch it up. And it bothers me to sleep next to it.

The bullet went through her head. I don't know how she was lying or how she was even shot. I never even knew. But the bullet went through her head and into the wall. Some of her clothing is still here, not much, I find a piece here and a piece there.

NARRATOR
Jake met Colleen in the spring of 1983 after he saw pictures of her in *Penthouse* magazine.

JAKE EHRLICH
I opened it up and I saw the section she was in and I said this girl's gorgeous, this girl's for me. Bobby Hollander's her agent and he'll come around.

NARRATOR
He learned that Colleen's manager was Bobby Hollander, one of his cocaine customers.

Jake Ehrlich: *He brought her over and this little girl with like just washed hair, you know, curling up and a little Gumby t-shirt and a pair of jeans. And I said no this couldn't be the girl. This girl is maybe 14, 15, 16 years old. But it was her you know. Not what I expected. Not the fantasy. It wasn't the fantasy from the magazine. She came here and she never left.*

Interviewer: *She just stayed?*

Jake Ehrlich: *She just stayed. She found home.*

Interviewer: *And she quit doing pornography.*

Jake Ehrlich: *She just stopped dead. She was very happy in the very beginning. Very exuberant, happy person. She'd call up everyone. I'm in love. I love Jake. You know people would tell me, Jake this girl really loves you. And it started building up. She would call home for recipes, to her parents. "I'm not in the business no more, and give me the recipe for that. I'm cooking for Jake."*

NARRATOR
Sometimes, late at night, with the stereo on, Colleen tape-recorded her thoughts.

ON TAPE

Colleen Applegate: *You amaze me, Jake. Here I am 20 years old and in love with a man twice my age. You let me be Colleen. And you don't expect me to be anybody else. You respect me and you care about me, and you at least like me.*

JAKE EHRLICH
She was basically happy living here. She was safe from the outside world.

NARRATOR
Colleen stopped making adult films but the people she had met in that business often came to visit her at Jake's.

THERESA SICHENEDER
There was always drugs around. It was like a non-stop party.

NARRATOR
Her friend Theresa came from Minnesota to see her once.

THERESA SICHENEDER
Well, I remember a bad experience at one of these parties that I was offered something that I thought was a joint and it was something called "Jerry Lewis' Kids"; it made you feel retarded. And that was the point I decided I shouldn't be there. It scared the heck out of me.

I believe Colleen was dependent on Jake for her habit, and because he had a beautiful house. She was very dependent on people.

JAKE EHRLICH
We just started drifting a little bit apart. You know, I couldn't supply her with the amount of attention she needed.

She couldn't...she would follow me from one room to another. It's just something I couldn't take. I just couldn't take it. So I'd constantly push her off.

NARRATOR
Jake didn't know it, but Colleen had become involved with a college student during a trip back to Minnesota.

He doesn't want to be identified.

COLLEGE STUDENT
She just seemed like someone who had made a mistake and she didn't want to be doing it anymore, according to her, and I mean, she was friendly and intelligent, and pretty and fun to be with, we had a great time.

THERESA SICHENEDER
Now, she told me that she was going to marry him and I don't know if he, if they'd actually talked about that. But in her heart, that was her dream. To marry him. Come back, go to school. Be a regular college student. Use her mind, 'cause she had a good mind, and marry him.

NARRATOR
And yet Colleen stayed with Jake. And her cocaine addiction worsened.

JAKE EHRLICH
It's hard for a cocaine dealer to control someone that's close to you. Especially if you're selling it. How can you say you shouldn't do it. It's no good for you. Meanwhile, I'm doing it myself and I'm selling it.

BRENDA ROSENOU
She got real thin. She was real pale. Wasn't eating. She just looked sick. You know, and, and I would always ask her, I would say, "Why, why do you keep doing it? Why don't you stop for a while?", you know. She's like, "I'm okay. I don't do it that much." You know, and I'd say, "Well look at you, you're, you know, 90 pounds!"

NARRATOR
Jake urged her to get psychiatric help. She refused. And one night he told her she'd have to move out.

Jake Ehrlich: *She said, if that's the end, I'll show you. She runs into my bedroom and I hear her pick up my rifle and it goes click, click, and I run in there real fast. I didn't take her serious. I figured she just wants attention. She wants something. I ran in there quick enough that she had the rifle cocked.*

Interviewer: *She hadn't pulled the trigger?*

Jake Ehrlich: *No, no.*

Interviewer: *She cocked the rifle...*

Jake Ehrlich: *She cocked it.*

Interviewer: *And it was loaded?*

Jake Ehrlich: *It was loaded. I kept a rifle, it was a 22 rifle the same rifle she took her life with. But I didn't take her serious, you know, I figured she just wants attention. She's mad and you know, and I could handle situations. You know. Either you know we sat down on the bed, we talked and I says, "Alright, you don't have to move. You can stay here. And when you're ready, you'll move!" You know. I was scared.*

NARRATOR
A few days later in February, 1984, police arrested Jake for drug dealing. He was taken to jail and faced several years in prison.

EROTIC FILM AWARDS

Announcer: *The Adult Film Association of America proudly presents the eighth annual Erotic Film Awards. Adult movies have come of age.*

NARRATOR
Colleen had not made a hard core film in the ten months she lived in Palm Springs, but three of her earlier performances were nominated for awards.

Announcer: *Shauna Grant, for "Flesh and Laces." Parts One and Two.*

"FLESH AND LACES" CLIP

Colleen Applegate: *My rate's a hundred dollars an hour.*

Man: *Are you worth that?*

Colleen Applegate: *Of course I'm worth it. You asked for a top model. You're gonna get it.*

Announcer: *Mr. John Leslie and Miss Shauna Grant.*

NARRATOR
She didn't win but it must have been an exciting evening for Colleen.

Francis Ford Coppola was seated at the same table.

NARRATOR (Cont.)
Colleen found she was still very much in demand. That night she agreed to make another adult film and was to begin shooting it in eight days. It was seven days before her death.

A few days after the awards show, Colleen's Minnesota boyfriend arrived in Los Angeles to see her. She never showed up at the airport.

LAURIE SMITH
Oh, there was a mixup. The fact that Colleen just totally disregarded the fact he was flying in...forgot. She forgot he was coming in. She'd made plans for two months to have him come out to, from Minnesota. And he finally got the time to come out, and she knew about it for two weeks, she knew. But then, when it came down to that day, we had gone to the awards and we had got wasted and then we were hanging out at my house, slept for two days. And we didn't know how we were gonna get there, because we didn't have a car. So we had to figure out a way to get there and that's what she was doing all that day was figuring out a way to get there and that's when Jake called and all the shit came down.

NARRATOR
Jake phoned Colleen from jail, told her their relationship was over. She would have to move out.

JAKE EHRLICH
I got this seed planted in my mind, the boyfriend's coming in town, uh, she didn't pay none of the bills. She says--destroyed the two thousand dollars on mostly drugs, limousines and partying. Uh, all these things are building in my head and I'm saying, hey man, *stop her. Now!!!*

NARRATOR
Colleen called her old friend, Brenda, and asked her to come over and keep her company while she packed.

BRENDA ROSENOU
And she was like real depressed. And she wasn't talking much. She was just kind of sitting around. She wasn't, you know, you could tell she wasn't happy at all.

NARRATOR
She'd run out of money...and cocaine. In two days she'd be performing sex on camera again. And now she had to pack and get out.

BRENDA ROSENOU
And the stereo was on and she went back into her bedroom.

ON TAPE

Colleen Applegate: *I remember the first time I really, really was lonely and depressed and down and I wasn't doing so hot. I was stuck and I had no one to depend on but me. That was the first time I really felt bad. And that was minute compared to what's come and what's happened since then...*

BRENDA ROSENOU
I heard a pop, like a loud pop, and I look, and she was laying there, there was like two mattresses pushed together on the bed and there was like a crease and there was blood going all the way down the crease, but you couldn't see any blood on her.

So I tilted her head up and I was just trying to see, you know, I was trying to look at her and I was like "Colleen, Colleen," 'cause she was still breathing.

KAREN APPLEGATE
A girl named Laurie called here at midnight our time. And was crying on the phone and asked if we knew about Colleen, and we didn't. And she said that, that, uh, she was in LA, but Brenda had called her and told her that Colleen shot herself. And she was just wondering if I knew and I didn't hear from anybody.

NARRATOR
At the hospital, machines kept Colleen alive for 24 hours. Her mother and friends were there.

DANIELLE MARTIN
And I had, had this ring that was a little heart with some diamonds on it, and, uh, I wore it on my wedding finger and I had asked um, Colleen's mom if I could give it to her. And she's like, are you sure, and? And you know, I, I gave it to her. You know, I was afraid to even touch her. It was like reaching and I asked, you know, can I? Can I touch her? You know she just looked so frail and everything. It was just so different to see someone with a bullet through their head, you can imagine...And, so I took it off my wedding finger and it wouldn't even fit on hers. It, her body was being kept alive by machines and circulation when it goes, your body swells up. And, and I just knew that she wasn't there. It wasn't her.

DANIELLE MARTIN (Cont.)
It wasn't Colleen.

KAREN APPLEGATE
Her eyes were donated. I, I got two different letters about her eyes and um, her kidneys were supposed to be, but I never heard from them, so I don't know if it worked or it didn't work or I never heard back. But, if, that's what I signed for them to take.

NARRATOR
Colleen Applegate went to California in March, 1982. She died there in March, 1984.

She went in search of something, not knowing what, and with only her beauty to offer in return, and she got lost.

She left home incomplete, unequipped for the adventure she'd have, lacking an inner compass.

Like Dorothy from Kansas, Colleen found herself in a dangerous forest. But there was no scarecrow along to help her find the way out.

ON TAPE

Colleen Applegate: *Maybe adults learn too much. Maybe we should all go back to being kids.*

Wouldn't it be wonderful to be a kid and keep the honesty and be totally ignorant to hate and loneliness and disgust?

JUDY WOODRUFF
A final thought. The story of Colleen's life is singular, unique...unlike any other. But it's also part of a larger, more troubling story. Each year, the number of young people in trouble seems to be increasing...some run away...some get in trouble with the law...some--like Colleen, attempt suicide. Last year an estimated 400,000 attempted suicide; 6,000 succeeded. Is all this a way of telling us that we need to pay more attention to our young people?

Thank you for joining us.

I'm Judy Woodruff. Good night.

FRONTLINE
with JUDY WOODRUFF

Reported and Written by
AL AUSTIN

Produced and Written by
ANDY GREENSPAN

Directed, Photographed and Edited by
PAUL HENSCHEL

Field Sound
DAVID RICHARDS

Post Production Editor
KEN ANDERSON

Post Production Audio
TED GOLBUFF

"Centerfold Celebrities" Footage
Courtesy VISUAL ENTERTAINMENT

"Fallen Angels" Footage Courtesy
WENDY APPLE and RICHARD LERNER

Executive Producer for WCCO
MICHAEL SULLIVAN

WGBH Educational Foundation and
WCCO Television
Copyright 1987/All Rights Reserved

for FRONTLINE

Producer/Director
JANET MCFADDEN

Post Production Supervisor
JUDY BANKS

Production Assistant
MERLE R. EISMAN

Production Secretary
ROBERT LEVINE

Field Production
VIC PEMINTEL
STEVEN CARRUS

Videotape Editors
MARK STEELE
DANDA STEIN

Graphic Design
JACK FOLEY

FRONTLINE Theme by
MASON DARING
MARTIN BRODY

Promotion
MICKI GRIFFIN
MARCY DEVEAUX
ELIZABETH KARAGIANIS
ALLISON DASKAL

Executive Assistant
KAREN L. ROACH

Secretaries
LETTY HUMMEL
TRACEY CLOUTIER

Associate Producer
MARSHA BEMKO

Staff Producer
ELIZABETH ARLEDGE

Unit Manager
ELAINE WITHROW

Business Manager
KAI FUJITA

Series Editor
MARRIE CAMPBELL

Senior Producer
MICHAEL KIRK

Executive Editor
LOUIS WILEY, JR.

PRODUCYION CREDITS: Death of a Porn Queen 33

Executive Producer
DAVID FANNING

A co-production of WCCO and
FRONTLINE

WGBH Educational Foundation
Copyright 1987/All Rights Reserved

FRONTLINE is produced for the
Documentary Consortium by WGBH-Boston,
which is solely responsible for its
content.

For information about buying or renting a videocassette or film of any NOVA program contact Coronet Films & Video, 108 Wilmot Road, Deerfield, IL 60015 call: 1-800-621- 2131 (Illinois and Alaska residents call collect (312)940-1290.

For information about buying or renting a videocassette of FRONTLINE, contact PBS Video, 1320 Braddock Place, Alexandria, VA 22314-1698 call: 1-800-424-7963 or (703) 739-5000.

VIDEOTAPE/FILM copies of other programs may be available for sale or rental, for visual and broadcast use. For information, contact:

WGBH Distribution, 125 Western Avenue, Boston, MA 02134
(617)-492-2777

TRANSCRIPTS of programs* are available in bulk and individually from:

(Title of Series)
(Title of Program)
Box 322
Boston, MA 02134

Bulk Rate:
20 or more copies of any one program transcript can be supplied for a reduced price of $3/copy for a minimum order of 20 copies of one transcript. This offer is limited to programs broadcast since 1979.

Individual Copies
Programs from NOVA and other series since 1979 are available in most cases as printed booklets. Transcripts of NOVA programs from 1974 to 1978 are available in most cases as 8 1/2 x 11 photocopies.

Prices: $4/copy (1982-1986)
$6/copy (1974-1981)

Please make checks payable to "WGBH Transcripts." Do not send cash. ALLOW 4-6 WEEKS FOR DELIVERY.

*For lists of titles available please send $1.00 to:
WGBH Transcript Catalogue
Box 327
Boston, MA 02134

NOVA TEACHER'S GUIDES are available for $2 per copy, to cover postage and handling. (Make checks payable to WGBH NOVA Teacher's Guides.) Address orders to:

WGBH NOVA Teacher's Guide
Box 2222
South Easton, MA 02375

FRONTLINE #513

Death of a Porn Queen

FRONTLINE is made possible by grants from this station, other public television stations nationwide, and the Corporation for Public Broadcasting.

This program was originally broadcast on PBS on June 9, 1987

Copyright © 1987 WGBH Educational Foundation

Under no circumstances may this transcript or matters contained herein be reproduced or otherwise used for any purpose beyond the private use of the recipient (other than for newspaper coverage, purposes of reference, discussion and review) without prior written consent of WGBH Educational Foundation. For information about reproduction and bulk rates, contact:

WGBH Transcripts
125 Western
Boston, MA 02134
(617)-492-2777

FRONTLINE
WGBH TV
125 Western Avenue
Boston, Massachusetts 02134

Non-Profit
Organization
U.S. Postage Paid
WGBH Educational
Foundation